

90-443

Supreme Court, U.S.
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JOSEPH F. ANOL, JR.

No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Fifth Circuit erroneously extended the "merger" doctrine, contrary to Section 102(a) of the United States Copyright Act, 17 U.S.C. § 102(a) and 200 years of judicial precedent, to preclude copyright protection for maps created on the basis of extensive field research, analysis and direct observation, thereby jeopardizing protection for all maps.

(2) Whether the Fifth Circuit erred in refusing to recognize a presumption of irreparable harm for purposes of determining the availability of preliminary injunctive relief pursuant to Section 502(a) of the Copyright Act, 17 U.S.C. § 502(a), in direct and acknowledged conflict with every other Circuit Court to consider that issue.

(3) Whether the copying of Petitioner's maps by Respondents for the purpose of obtaining regulatory approval for a competing proposal involving construction of a 1,000 mile natural gas pipeline constituted "fair use" under Section 107 of the Copyright Act, 17 U.S.C. § 107.

PARENT AND SUBSIDIARY CORPORATIONS

The following list of Petitioner's parent and subsidiary corporations is provided pursuant to Rule 29 of the Supreme Court Rules.

Petitioner is a Texas partnership formed by Tenneco Inc. and The Williams Companies, Inc.

AFFILIATES OF TENNECO, INC.

Adela Investment Company, S.A.
 Akulu Marchon (PTY) Ltd.
 Albright, Morarji and Pandit Limited
 Albright & Wilson (Australia) Ltd.
 Alcan Ekco Limited (United Kingdom)
 A/S Haustrup-Ekco Aluminium-Emballage (Denmark)
 AWAT Thai Ltd. (Thailand)
 Bracey Petroleum Products Ltd.
 Butler (1843) Ltd. (United Kingdom)
 Case Proclair GmbH & Co.
 Collins Pipeline Company
 Consolidated Diesel Company (North Carolina Partnership)
 Deposititas Del Norte, S.A.
 Etablissement L. Bouilloux S.A. (France)
 Ethoxylates Manufacturing Pte Ltd. (Singapore)
 FC Marine Inc.
 Gardinol Product (PTY), Ltd.
 HT Gathering Company
 Intertractor Viehmann GmbH & Co.
 Kern Island Water Company
 Kern River Canal and Irrigation Company
 Kern River Gas Supply Corporation (Delaware)
 Kern River Gas Transmission Company
 Kern River Service Corporation (Delaware)
 Losenhausen Maschinenbau AG & Co.
 Losenhausen Machinebau AG

Marchon-Paragon Holdings (PTY) Limited
 Marchon-Paragon Sulphonation (Cape) (PTY) Ltd.
 Marchon-Paragon Sulphonation (PTY) Ltd.
 Mistal Inc.
 Monroe Auto Pecas S.A.
 National Brands (PTY), Ltd.
 Oasis Pipeline Company (Delaware)
 Omni-Pac GmbH
 P.P.M. Guindastes Hidraulicos S.A.
 Polyphosphates Inc.
 Poclain S.A.
 Productora Andina de Acidos y Derivados Ltd. (Columbia)
 SBG Puerto Rico, Inc. (Puerto Rico)
 S.A. Paper Chemicals (Proprietary), Limited
 Sara Gretes Cafeteria AB
 Skogstre A/S
 T&M Terminal Company
 Tees Storage Company Limited
 TENN-USS Chemicals Finance Corporation
 Tenneco Automotive Foreign Sales Corporation Limited
 (Jamaica)
 Tenneco Oil Company of Nigeria Unlimited
 Tenneco Oil of Nigeria Unlimited
 Tenngasco Gas Gathering Company
 Trminales Quimicos S.A. (Spain)
 Tess Storage Company Limited
 Thai Polyphosphate & Chemicals Co. Ltd. (Thailand)
 Toyo Ekco Company, Ltd. (Toyo Ekco Kubushiki, Kaisha)
 (Japan)
 Tractortechinc Canada, Inc.
 Tunisian American Date Company (Tunisia)
 U.I. Case do Brasil & Cia.
 Universal Chemical Contractors (PTY)
 Vibromax France SARL
 Vibromax France SCI
 Vibromax SCI (France)
 W.R. John & Company (Rumney) Ltd.

AFFILIATES OF THE WILLIAMS COMPANIES, INC.

The Williams Companies, Inc.
 BankOklahoma Corp.
 F T & T, Inc.
 Kern River Gas Supply Corporation
 Kern River Service Corporation
 Langside Limited
 Louisiana Gas Marketing Company
 Louisiana Resources Company
 NGL Production Company
 Northwest Alaska Company
 Northwest Energy Company
 Apco Argentina Inc.
 Apco Properties Ltd.
 Diginet Incorporated
 Northwest Alaskan Pipeline Company
 Northwest Border Pipeline Company
 Northern Border Pipeline Company
 Northwest Canadian Gas Sales Company
 Williams Field Services Company
 Northwest International Company
 Northwest Argentina Corporation
 Northwest Investments, Incorporated
 Silver Lake Knoll, Inc.
 Northwest Land Company
 Northwest Overseas Capital Corporation, N.V.
 Northwest International Finance B.V.
 Northwest International Finance N.V.
 Northwest Pipeline Corporation
 Prairie Transmission Lines Limited
 Pacific Northwest Realty Corporation
 Williams Natural Gas Company
 Northwest Exploration Company
 Realco Realty Corp.
 Willcentre, Inc. Williams Center, Inc.
 Realco Realty Developments, Inc.
 Realco Realty Interest, Inc.

Realco of Crown Center, Inc.
Realco of San Antonio, Inc.
Realco of Utah, Inc.
Tulsa Williams Company
Williams Acquisition Holding Company, Inc.
Agrico Chemical of Oklahoma, Inc.
Agrico Disc, Inc.
Agrico Foreign Sales Corporation
Agrico Thailand, Inc.
Fishhawk Ranch, Inc.
Texasgulf Inc.
Willco, Inc.
Williams Exploration Company
Paraffine-Williams Company
Rainbow Resources, Inc.
Williams Gas Company
Williams Gas Management Company
Williams Gas Marketing Company
Williams Gas Supply Company
Williams Natural Gas Liquids Company
Williams Pipe Line Company
WillBros Terminal Company
Williams Terminals Company
Williams Relocation Services, Inc.
Williams Telecommunications Group, Inc.
Williams Telecommunications Services, Inc.
WTG - Central, Inc.
WTG - West, Inc.
WTG of California, Inc.
WTG Network, Inc.
Williams Western Pipeline Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARENT AND SUBSIDIARY CORPORATIONS	ii
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
I. Statement of Facts	5
II. Proceedings Below	9
REASONS FOR GRANTING CERTIORARI	11
I. THE FIFTH CIRCUIT'S UNPRECEDENTED APPLICATION OF THE "MERGER" DOC- TRINE NEGATES COPYRIGHT PROTECTION FOR ALL MAPS AND CONTRADICTS A LONG LINE OF AUTHORITIES GOING BACK TO THE FIRST COPYRIGHT ACT OF 1790.	11
A. Maps Prepared Through Independent Surveys And Direct Observations By Car- tographers In The Field Have Always Been Subject To Copyright Protection. .	13
B. The Fifth Circuit's Opinion Upsets The Copyright Protection Historically Recog- nized For Compilations Of Data.	16
C. The Court of Appeals Ignored This Court's Instructions in <i>Pullman Standard</i> and <i>Inwood Laboratories</i> in Reversing the District Court's Factual Findings in Re- spect to the Validity of Petitioner's Copyrights.	19

II. THERE IS A DIRECT AND ACKNOWLEDGED CONFLICT OF AUTHORITY BETWEEN THE FIFTH CIRCUIT AND EVERY OTHER CIR- CUIT TO CONSIDER THE AVAILABILITY OF A PRESUMPTION OF IRREPARABLE HARM UNDER SECTION 502(a) OF THE COPYRIGHT ACT.	22
III. THE COURT OF APPEALS VIOLATED THIS COURT'S INSTRUCTIONS IN <i>STEWART</i> AND <i>HARPER & ROW</i> BY REFUSING TO CON- SIDER WHETHER RESPONDENTS' COPYING AND COMMERCIAL EXPLOITATION OF PETITIONER'S MAPS CONSTITUTED "FAIR USE" UNDER THE FACTORS SET FORTH IN SECTION 107 OF THE COPYRIGHT ACT.	26
CONCLUSION	29

TABLE OF AUTHORITIES

CASES:	Page
<i>Alfred Bell & Co. v. Catalda Fine Arts, Inc.</i> , 191 F.2d 99 (2d Cir. 1951)	15
<i>Amsterdam v. Triangle Publications, Inc.</i> , 189 F.2d 104 (3d Cir. 1951)	16
<i>Apple Barrel Productions Inc. v. Beard</i> , 730 F.2d 384 (5th Cir. 1984)	23
<i>Apple Computer, Inc. v. Formula International, Inc.</i> , 725 F.2d 521 (9th Cir. 1984)	25
<i>Apple Computer, Inc. v. Franklin Computer Corp.</i> , 714 F.2d 1240 (3d Cir.), cert. dism'd, 464 U.S. 1033 (1984)	12,25
<i>Atari, Inc. v. North American Philips Consumer Electronics Corp.</i> , 672 F.2d 607 (7th Cir.), cert. denied, 459 U.S. 880 (1982)	25
<i>Baker v. Selden</i> , 101 U.S. 99 (1879)	11,12
<i>Belushi v. Woodward</i> , 598 F.Supp. 36 (D.D.C. 1984)	26
<i>Bleistein v. Donaldson Lithographing Co.</i> , 188 U.S. 239 (1903)	15
<i>Blunt v. Patten</i> , F. Cas. No. 1580 (C.C.N.Y. 1828)	14
<i>C.S. Hammond & Co. v. International College Globe, Inc.</i> , 210 F.Supp. 206 (S.D.N.Y. 1962)	15
<i>Concrete Machinery Co. v. Classic Lawn Ornaments</i> , 843 F.2d 600 (1st Cir. 1988)	24,25
<i>County of Ventura v. Blackburn</i> , 362 F.2d 515 (9th Cir. 1966)	15
<i>Crocker v. General Drafting Co.</i> , 50 F.Supp. 634 (S.D.N.Y. 1943)	15
<i>Del Madera Properties v. Rhodes & Gardner, Inc.</i> , 820 F.2d 973 (9th Cir. 1987)	16
<i>Educational Testing Services v. Katzman</i> , 793 F.2d 533 (3d Cir. 1986)	12

Table of Authorities Continued

	Page
<i>Edwards & Deutsch Lithographing Co. v. Boorman</i> , 15 F.2d 35 (7th Cir. 1926)	17
<i>Emerson v. Davies</i> , 8 Fed. Cas. 615 (No. 4436) (C.C.D. Mass. 1845)	14
<i>Farmer v. Calvert Lithographing Co.</i> , 8 F. Cas. 1022 (No. 4651, C.C.E.D. Mich. 1872)	14
<i>Forry, Inc. v. Neundorfer, Inc.</i> , 837 F.2d 259 (6th Cir. 1988)	25
<i>Fred Fisher, Inc. v. Dillingham</i> , 298 F. 145 (S.D.N.Y. 1924)	12
<i>General Drafting Co. v. Andrews</i> , 37 F.2d 54 (2d Cir. 1930)	15
<i>Gray v. Russell</i> , 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839)	14
<i>Hasbro Bradley v. Sparkle Toys, Inc.</i> , 780 F.2d 189 (2d Cir. 1985)	25
<i>Harper & Row Publishers, Inc. v. Nation Enter- prises, Inc.</i> , 471 U.S. 439 (1985)	27,28
<i>Hutchinson Telephone Co. v. Fronteer Directory Co. of Minnesota, Inc.</i> , 640 F.Supp. 386 (D. Minn. 1986)	25
<i>Inwood Laboratories, Inc. v. Ives Laboratories, Inc.</i> , 456 U.S. 844 (1982)	5,19,22,30
<i>Jackson v. MPI Home Video, Inc.</i> , 694 F.Supp. 483 (N.D.Ill. 1988)	25
<i>Jewelers' Circular Pub. Co. v. Keystone Pub. Co.</i> , 274 F. 932 (S.D.N.Y. 1921), <i>aff'd</i> , 281 F. 83 (2d Cir.), <i>cert. denied</i> , 259 U.S. 581 (1922) ...	17,18
<i>Kelly v. Morris</i> , 1 Eq. 697 (1886)	18
<i>Key Maps, Inc. v. Pruitt</i> , 470 F. Supp. 33 (S.D. Tex. 1978)	27
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	12,13,17

Table of Authorities Continued

	Page
<i>Meredith Corp. v. Harper & Row Publishers, Inc.</i> , 378 F.Supp. 686 (S.D.N.Y.), <i>aff'd</i> , 500 F.2d 1221 (2d Cir. 1974)	25
<i>Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc.</i> , 479 F.Supp. 351 (N.D.Ga. 1979)	25
<i>National Football League v. McBee & Bruno's, Inc.</i> , 792 F.2d 726 (8th Cir. 1986)	25
<i>Newton v. Voris</i> , 364 F.Supp. 562 (D.Ore. 1973) ..	15
<i>O'Neill Developments, Inc. v. Galen Kilburn, Inc.</i> , 524 F.Supp. 710 (N.D.Ga. 1981)	25
<i>Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.</i> , 642 F.Supp. 1031 (N.D.Ga. 1986)	25-26
<i>Pacific & Southern Co. v. Duncan</i> , 744 F.2d 1490 (11th Cir. 1984)	28
<i>Plains Cotton Cooperative Association v. Goodpas- ture Computer Service, Inc.</i> , 807 F.2d 1256 (5th Cir.), <i>cert. denied</i> , 484 U.S. 821 (1987)	5,23,26
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)	5,19,21,30
<i>Rockford Map Publishers, Inc. v. Directory Service Co.</i> , 768 F.2d 145 (7th Cir.), <i>cert. denied</i> , 474 U.S. 1061 (1986)	17,18
<i>Rushton v. Vitale</i> , 218 F.2d 434 (2d Cir. 1955)	25
<i>Sawyer v. Crowell Publishing Co.</i> , 142 F.2d 497 (2d Cir. 1944)	15
<i>Schroeder v. William Morrow & Co.</i> , 566 F.2d 3 (7th Cir. 1977)	17
<i>Sony Corporation of America v. Universal City Stu- dios, Inc.</i> , 464 U.S. 417 (1984)	24
<i>Southern Monorail Co. v. Robbins & Myers, Inc.</i> , 666 F.2d 185 (5th Cir. 1982)	23
<i>Stewart v. Abend</i> , — U.S. — , 109 L.Ed.2d 184 (1990)	27

Table of Authorities Continued

	Page
<i>Uneeda Doll Co. v. Goldgarb Novelty Co.</i> , 373 F.2d 851 (2d Cir. 1967)	25
<i>United States v. Hamilton</i> , 583 F.2d 448 (9th Cir. 1978)	15
<i>United States v. Real Estate Boards</i> , 339 U.S. 485 (1950)	22
<i>Video Trip Corp. v. Lightning Video, Inc.</i> , 866 F.2d 50 (2d Cir. 1989)	25
<i>Walt Disney Productions v. Air Pirates</i> , 345 F.Supp. 108 (N.D.Cal. 1972)	25
<i>West Publishing Co. v. Mead Data Center, Inc.</i> , 799 F.2d 1219 (8th Cir.), <i>cert. denied</i> , 479 U.S. 1070 (1986)	25
<i>Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.</i> , 653 F.Supp. 135 (N.D.Ohio 1986)	25
<i>WPOW, Inc. v. MRLJ Enterprises</i> , 584 F.Supp. 132 (D.D.C. 1984)	20,26,29

STATUTES

Act of May 31, 1790, 1st Cong., 2d Sess., Ch. 15, 1 Stat. 124	13
Copyright Act Of 1976, <i>as amended</i> , 17 U.S.C. §§ 101 <i>et seq.</i> (1982 & 1986 Supp. IV)	2
17 U.S.C. § 101	2
17 U.S.C. § 102(a)	2
17 U.S.C. § 102(a)(5)	2
17 U.S.C. § 102(b)	3
17 U.S.C. § 103(a)	3,16
17 U.S.C. § 103(b)	17
17 U.S.C. § 107	3,5,27
17 U.S.C. § 502(a)	4,22,23,25
28 U.S.C. § 1292(a)	10
28 U.S.C. § 1331	2
28 U.S.C. § 1338(a)	2

Table of Authorities Continued

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2101(c)	2
Fed.R.Civ.P. 52(a)	4,20,21,,22,26,30
National Environmental Policy Act, 42 U.S.C. §§ 4331 <i>et seq.</i>	6
MISCELLANEOUS	
Goldstein, <i>Copyright</i> (1990 ed.)	15
Gorman, <i>Copyright Protection for the Collection and Representation of Facts</i> , 76 Harv. L. Rev. 1569 (1963)	15,16,18
Gorman, <i>Fact or Fancy? The Implications for Co- pyright</i> , 29 J. Copyright Soc'y USA 560 (1982)	12,16
3 Nimmer, <i>Nimmer on Copyright</i> (1989 ed.)	23,25
Whicher, <i>Originality, Cartography, and Copyright</i> , 38 N.Y.U.L. Rev. 280 (1963)	15

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 899 F.2d 1458 (5th Cir. 1990), and is reproduced in the Appendix ("App.") at App. 1a-13a. The unreported opinion of the United States District Court for the Southern District of Texas is reproduced at App. 14a-21a.

JURISDICTION

This case arises under the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq* (1982 & 1986 Supp. IV) (hereinafter the "Copyright Act"). Federal jurisdiction is founded upon 28 U.S.C. §§ 1331 and 1338(a). This Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

Section 101 of the Copyright Act provides in pertinent part:

As used in this title, the following terms and their variant forms mean the following:

* * *

"Pictorial, graphic, and sculptural works" include two dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, *maps*, globes, charts, technical drawings, diagrams, and models. * * *

17 U.S.C. § 101 (emphasis added).

Section 102 of the Copyright Act provides:

- (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

* * *

- (5) pictorial, graphic and sculptural works;

* * *

- (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. § 102.

Section 103(a) of the Copyright Act provides in pertinent part:

- (a) The subject of copyright as specified by section 102 includes *compilations* . . .

17 U.S.C. § 103(a) (emphasis added).

Section 107 of the Copyright Act provides:

[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified [in Section 106], for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Section 502(a) of the Copyright Act provides:

- (a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a).

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

Findings of fact . . . *shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Fed.R.Civ.P. 52(a) (emphasis added).

STATEMENT OF THE CASE

This case calls upon the Court to correct a decision of the U.S. Court of Appeals for the Fifth Circuit which negates copyright protection for maps through a novel application of the "merger doctrine," contrary to a long line of established authority going back to the first copyright act. In reaching its unprecedented finding, the Court of Appeals ignored the primary issue presented to it, namely, whether a presumption of irreparable harm may be recognized by the district court in considering the availability of preliminary injunctive relief under Section 502(a) of the Copyright Act, 17 U.S.C. § 502(a). There is a direct and acknowledged conflict of opinion among the circuits

on this issue; the Fifth Circuit is the only court which refuses to recognize the presumption.¹

The Court of Appeals was able to reach the merger issue only by rendering independent findings of fact in violation of Rule 52(a) of the Federal Rules of Civil Procedure (Fed.R.Civ.P.) and in direct conflict with this Court's instructions in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). In this manner the Fifth Circuit also ignored the other significant issue presented to it, *i.e.*, whether the copying of Petitioner's maps by Respondents for the purpose of obtaining regulatory approval for a competing proposal involving construction of a 1,000 mile natural gas pipeline constituted "fair use" under Section 107 of the Copyright Act, 17 U.S.C. § 107.

I. Statement of Facts

The copyrighted maps at issue² depict a proposed 1,000 mile natural gas pipeline extending from southwestern Wyoming to Bakersfield, California. Over a period of approximately two years, the pipeline route was developed and drawn in intricate detail by Petitioner's engineers and cartographers onto approximately 140 topographical maps obtained from the United States Geological Survey (USGS). It is undisputed that Petitioner developed these detailed

¹ Prior to the Court of Appeals' ruling, Petitioner filed a Suggestion for Hearing *En Banc* in order to present the Fifth Circuit with an opportunity to reconsider its holding in *Plains Cotton Cooperative Association v. Goodpasture Computer Service, Inc.*, 807 F. 2d 1256 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987). The Fifth Circuit in *Plains Cotton* rejected the prevailing view and held that, for purposes of determining the availability of preliminary injunctive relief in a case of copyright infringement, a presumption of irreparable harm is "not established" in the Fifth Circuit. See discussion below. The Court of Appeals summarily denied Petitioner's Suggestion.

² These maps are subject to U.S. Certificate of Copyright Registration No. VAu 145 000, issued by the Copyright Office on February 7, 1989 (reproduced at App. 23a).

1:24,000 scale "quad" maps by conducting "full, independent field work along every segment of the proposed route." 899 F.2d at 1460 (App. 3a). The costs incurred by Petitioner in creating these maps amounted to millions of dollars, including payroll, vehicle rentals, helicopter lease time, radio communication systems and geotechnical studies.

All of this activity occurred in the context of regulatory proceedings conducted by the Federal Energy Regulatory Commission (FERC). These proceedings involved applications by various parties, including Petitioner and Respondents, to construct and operate a natural gas pipeline serving the market in and around Kern County, California.

In October 1986, Petitioner submitted its original 1:24,000 scale "quad" maps of its proposed pipeline to the FERC in support of its application for regulatory approval, along with another set of larger scale 1:250,000 maps also prepared by Petitioner's draftsmen. Petitioner's large scale 1:250,000 maps, which are not at issue in this appeal, represented the approximate location of Petitioner's proposed route at that time. The highly detailed 1:24,000 maps, in contrast, depicted Petitioner's proposal for the actual placement of a 36-inch pipeline within that route.

Petitioner was the only party to conduct field investigations, environmental analysis and other survey work in connection with the placement of its proposed pipeline. Consequently, Petitioner's maps played a substantial role in the preparation of an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4331 *et seq.* Petitioner's maps eventually became the basis for a mile-wide route which was analyzed by the California State Lands Commission (CSLC) and ultimately approved by the FERC. This mile-wide section became known as the "EIS corridor" or "approved route," and was depicted by a line drawn by the FERC's con-

tractor on a set of 1:250,000 scale maps that was published with the agency's EIS.

The District Court found that Petitioner's large scale 1:250,000 scale maps could not be copyrighted because, at that scale, they were equivalent merely to the approved route, or EIS corridor, and as such constituted only the idea of the route. Petitioner has not contested that finding. However, the District Court held that Petitioner's 1:24,000 scale maps *were* subject to copyright protection because they expressed only one of innumerable possible placements of a specific pipeline within the mile-wide approved corridor. This finding was reversed by the Court of Appeals.

The distinction between the large-scale 1:250,000 maps depicting the approximate location of the approved route, and Petitioner's intricate 1:24,000 scale maps expressing a proposal for placement of a 36-inch pipeline *within* the approved route, is crucial to an understanding of this case because it underlies the District Court's dispositive factual finding. The large scale 1:250,000 maps which were ultimately adopted by the FERC, by use of a single line extending from southwestern Wyoming to Bakersfield, California, depicted the mile-wide swath of the approved route. These maps defined the broad path which the FERC deemed to be environmentally acceptable; a pipeline falling outside this "EIS corridor" would be subject to further environmental study.³ Any applicant was free to choose a pipeline route anywhere within the EIS corridor, and the 1:250,000 maps depicting the mile-wide approved route were available to all parties for that purpose.

In contrast, Petitioner's small scale 1:24,000 quad maps depicted in detail the proposed placement of a 36-inch pipeline within the mile-wide section which ultimately became FERC's approved route. These 1:24,000 scale maps

³ Memorandum and Order of Judge Hoyt, July 18, 1989, ¶ 13, p. 4.

reflected the skill, labor and associated expenses incurred by Petitioner's engineers and cartographers in the analysis and selection of Petitioner's exact path *within* the approved route. Access to the small-scale 1:24,000 quad maps was not necessary to other applicants in order to obtain regulatory approval, although such maps were available to all parties for purposes of analysis and verification. Respondents' right to *examine* Petitioner's maps for purposes of analysis and verification, as opposed to Respondents' right to *copy* them, is not challenged in this appeal.

Respondents, however, did more than merely examine the 1:24,000 maps for purposes of analysis and verification. The District Court found that Respondents *copied* the maps.⁴ On April 4, 1988, Respondent's draftsmen visited the Albuquerque headquarters of the independent consultant which had custody of Petitioner's maps and, in the course of a ten-hour day, copied each of Petitioner's approximately 140 copyrighted 1:24,000 maps. Respondents copied Petitioner's maps to avoid the expense and labor required to develop their own maps after being informed by the FERC that the pipeline route depicted on the maps which Respondents had previously submitted lay outside the mile-wide EIS corridor. These facts are undisputed.

Respondents concede that they distributed the copied maps to the FERC, the CSLC, the independent consultant and other interested persons in support of Respondents' competing pipeline proposal. Respondents also admit that they exploited their copies of Petitioner's maps for their own competitive purposes in presentations to potential customers, environmental groups, developers, planners and other regulatory agencies interested in the project. The issue raised is whether the Copyright Act protects a map-

⁴ Memorandum and Order of Judge Hoyt, July 18, 1989), ¶¶ 10, 11, pp. 3-4 (App. 16a).

maker's original works of cartographic authorship from such unauthorized copying and commercial exploitation.

II. Proceedings Below

On March 20, 1989, Petitioner filed motions for a temporary restraining order and preliminary injunction, together with a complaint for damages and injunctive relief alleging copyright infringement and common law misappropriation. The District Court granted Petitioner's motion for a temporary restraining order on March 27, 1989 and impounded Respondents' infringing copies of Petitioner's maps.

The District Court conducted hearings on Petitioner's motion for preliminary injunction on May 9-12 and 26, 1989 and resolved all but two of numerous issues in Petitioner's favor, holding that:

- (1) the 1:24,000 scale maps were subject to copyright protection;
- (2) Petitioner was the owner of the copyrights in the maps;
- (3) the copyrights in question were valid and subsisting; and
- (4) Respondents copied the maps, enabling them to produce their own detailed maps which they supplied to the FERC, the Bureau of Land Management, the California State Lands Commission, the U.S. Forest Service, and other agencies which required a detailed depiction of Respondents' proposed pipeline route, during the process of Respondents' application to obtain a certificate of public convenience and necessity.

However, the District Court found that Petitioner failed to prove a threat of irreparable harm, and that Respondents' use of Petitioner's maps constituted "fair

use" under 17 U.S.C. § 107.⁵ On July 18, 1989, the District Court issued a Memorandum and Order dissolving the temporary restraining order and denying Petitioner's request for a preliminary injunction.

Petitioner sought review of the District Court's denial of preliminary injunctive relief in an interlocutory appeal pursuant to 28 U.S.C. § 1292(a). In its appeal to the Fifth Circuit, Petitioner presented the two issues which formed the basis for the District Court's denial of preliminary injunctive relief: (1) whether the District Court erred in finding that Petitioner failed to establish irreparable injury as a prerequisite to preliminary injunctive relief; and (2) whether the District Court erred in holding that Respondents' copying of Petitioner's maps constituted "fair use."

In its reported opinion, the Fifth Circuit disregarded the issues presented in Petitioner's appeal and instead affirmed the District Court's denial of preliminary injunctive relief through an unprecedented application of the merger doctrine to preclude copyright protection for original works of cartography. This was a ground that the District Court had considered and rejected on the basis of the factual record. The Court of Appeals, with no regard to the "clearly erroneous" standard in Fed.R.Civ.P. 52(a), reversed the District Court's finding and held that recognition of copyright protection in the 1:24,000 maps would confer on Petitioner "a monopoly over the only approved pipeline route." 899 F.2d at 1465 (App. 12a). The Court of Appeals stated:

To extend protection to the lines [on Petitioner's 1:24,000 maps] would be to grant [Petitioner] a *mo-*

⁵ Even so, the District Court stated that it was "of the opinion that . . . [Petitioner] may have suffered damages and may prevail at the time of trial on the merits. . ." Memorandum and Order at pp. 7-8 (App. 21a).

nopoly of the idea for locating a proposed pipeline in the chosen corridor, a foreclosure of competition that Congress could not have intended to sanction through copyright law.

Id. at 1464 (App. 10a) (emphasis added). The Court of Appeals concluded:

[Petitioner] may not invoke the Copyright Act to monopolize the proposed location for a pipeline.

Id. (App. 11a)

Petitioner brought this error to the Court of Appeals' attention in a Petition for Rehearing, which was summarily denied in an Order dated June 15, 1990 (reproduced at App. 22a). On August 8, 1990, the District Court granted a renewed motion to dismiss filed by Respondents and dismissed Petitioner's claims.

REASONS FOR GRANTING CERTIORARI

I. THE FIFTH CIRCUIT'S UNPRECEDENTED APPLICATION OF THE "MERGER" DOCTRINE NEGATES COPYRIGHT PROTECTION FOR ALL MAPS AND CONTRADICTS A LONG LINE OF AUTHORITIES GOING BACK TO THE FIRST COPYRIGHT ACT OF 1790.

The merger doctrine, which dates back to *Baker v. Selden*, 101 U.S. 99 (1879),⁶ reflects the fact that some ideas admit of only a limited number of expressions. When there is essentially only one way to express an idea, the idea and its expression are inseparable or "merged" and copyright is no bar to copying that expression.

The merger principle . . . is a variation of the idea/expression dichotomy . . . [W]hen the idea and the expression of the idea coincide, then the expression will not be protected in order to prevent creation of

⁶ See also *Mazer v. Stein*, 347 U.S. 201 (1954).

a monopoly on the underlying "art." . . . [A]n expression will be found to be merged into the idea when "there are no or few other ways of expressing a particular idea."

Educational Testing Services v. Katzman, 793 F.2d 533, 539 (3d Cir. 1986), quoting *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir. 1983), cert. *dism'd*, 464 U.S. 1033 (1984).

However, there is a category of copyrightable works uniquely unsuited to application of the merger doctrine: maps. Professor Robert Gorman, the leading writer on copyright in factual works, has observed that the map "is the quintessential fact work. Its purpose is to depict geographic fact with utmost accuracy and conformity to nature. If ever there were a literary or art form in which fancy is generally to be discouraged, and in which expression is dictated by fact, it is the map." Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y USA 560, 564 (1982).

The Fifth Circuit has now issued a ruling which extends the merger doctrine in a manner which precludes copyright protection for maps in general. The appellate court's ruling is unprecedented, and its reliance on *Baker v. Selden* is in direct conflict with the decision in *Mazer v. Stein*, 347 U.S. 201 (1954), where this Court specifically discussed *Baker v. Selden* in explaining why the merger doctrine does *not* preclude copyright protection for maps:

The distinction [between patents and copyrights] is illustrated in *Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making maps of the same territory. *Though the maps are identical, each may obtain the exclusive right to make copies of his own particular map, and yet neither will infringe the other's copyright.* Likewise a copyrighted directory is not

infringed by a similar directory which is the product of independent work.

Mazer v. Stein, 347 U.S. at 217-18 (emphasis added). For the reasons discussed below, a writ of certiorari is necessary in this case to correct a serious error concerning an important issue of federal law.

A. Maps Prepared Through Independent Surveys And Direct Observations By Cartographers In The Field Have Always Been Subject To Copyright Protection.

Maps and charts have been copyrightable since 1790, being one of the original subjects of copyright under the first federal copyright law, which specified maps, charts and books as objects of protection. Act of May 31, 1790, 1st Cong., 2d Sess., Ch. 15, 1 Stat. 124. In 1839, Justice Story articulated the controlling principle:

There is no foundation in law for the argument, that because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources, have produced a similar work, one party may at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials, which have been accumulated and combined together by him. *Take the case of a map* of a county, or of a state, or an empire; it is plain, that in proportion to the accuracy of every such map, must be its similarity to, or even its identity with, every other. Now, *suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map . . .* It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. *But it is just as clear, that he has no right, without any such surveys and labors, to*

sit down and copy the whole of the map already produced by the skill and labors of the first party . . .

Gray v. Russell, 10 F. Cas. 1035, 1037-38 (No. 5728) (C.C.D.Mass. 1839) (emphasis added).

Six years later, in *Emerson v. Davies*, 8 F. Cas. 615 (No. 4436) (C.C.D. Mass. 1845), Justice Story explained:

A man has a right to the copy-right of a map of a state or country, which he has surveyed or caused to be compiled from existing materials, *at his own expense, or skill, or labor, or money*. Another man may publish another map of the same state or country, by using the like means or materials, and the like skill, labor and expense. But then he has no right to publish a map taken substantially and designedly from the map of the other person, without any such exercise of skill, or labor, or expense. *If he copies substantially from the map of the other, it is downright piracy*; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other.

8 F. Cas. at 619 (emphasis added). The same principle was stated again in 1872:

The defendant, no doubt, had the right to go to the common source of information, and having ascertained those boundaries, to have drawn them upon its map, notwithstanding that in this respect it would have been precisely like complainant's map . . . But he had no right to avail himself of this very labor on the part of complainant in order to avoid it himself.

Farmer v. Calvert Lithographing Co., 8 F. Cas. 1022, 1026 (No. 4651) (C.C.E.D. Mich. 1872). *Accord*, *Blunt v. Patten*, F.Cas. No. 1580 (C.C.N.Y. 1828).

In all of the cases going back to the first copyright act of 1790, copyright protection has never been denied to

maps produced as the result of "original effort in exploring, surveying, making inquiries, and drafting the map solely on the basis of one's own investigations."⁷ "The copyrightability of a cartographer's independent drawings of basic geographic boundary lines, even though they were ascertained from public domain sources, ha[s] long been settled on authority as well as principle.⁸ Copyright protection has been consistently afforded to maps like those of Petitioner. *E.g.*, *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966) (road and street data identifying owners and land parcels recorded on topographical maps obtained from U.S. government); *General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930) (detailed information based on personal interviews and observations recorded on topographical maps obtained from U.S. Geological Survey); see also *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *Sawyer v. Crowell Publishing Co.*, 142 F.2d 497 (2d Cir. 1944); *C.S. Hammond & Co. v. International College Globe, Inc.*, 210 F. Supp. 206 (S.D.N.Y. 1962); *Crocker v. General Drafting Co.*, 50 F. Supp. 634 (S.D. N.Y. 1943); *Newton v. Voris*, 364 F. Supp. 562 (D.Ore. 1973).

The Fifth Circuit's opinion radically alters the scope of copyright protection for maps. While the Fifth Circuit is not the first court to recognize the policy considerations against conferring a monopoly over the facts underlying the copyrighted expression,⁹ the Fifth Circuit is the first

⁷ Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1572 (1963). "Originality" requires only that the work display "something irreducible, which is one man's alone," *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), not that the work be novel in comparison with the works of others. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2d Cir. 1951).

⁸ Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U.L. Rev. 280, 288 (1963).

⁹ See Goldstein, *Copyright* (1990 ed.), § 2.14.1, p. 175. In fact, the

court to hold that such considerations negate *all* copyright protection where the map contains an original contribution based on direct observation.¹⁰

The Court of Appeals' unprecedented application of the merger doctrine to Petitioner's maps has far-reaching and negative implications for the copyright law, for virtually every map is "merged" with the idea it expresses.¹¹ The Supreme Court should grant a writ of certiorari to correct this serious error of law.

B. The Fifth Circuit's Opinion Upsets The Copyright Protection Historically Recognized For Compilations Of Data

Compilations of data such as those represented by the lines on Petitioner's 1:24,000 scale maps are independently subject to copyright protection under Section 103(a) of the Copyright Act, 17 U.S.C. § 103(a). Section 103(a) provides that "compilations" are copyrightable, subject to the lim-

primary debate over maps in the copyright literature focuses on whether some courts have correctly applied a stricter standard for copyright in maps for this reason. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1575 (1963). However, even under the most restrictive map decisions, copyright protection has *never* been denied "when the publisher of the map in question obtains originally some of [the] information by the sweat of his own brow." *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104, 106 (3d Cir. 1951) (denying copyright protection where mapmaker made no independent field observations and provided no original contribution).

¹⁰ Compare *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987). The plaintiff in *Del Madera Properties* claimed that the defendant had infringed its copyright in a tentative map of a subdivision by developing the subdivision in accordance with the plaintiff's map. The court rejected the defendant's arguments that (1) the map was uncopyrightable because it was a government enactment subsumed under the general zoning and development laws and that (2) the government's approval of the tentative map constituted a land use decision benefitting all present and subsequent owners of the property.

¹¹ See Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y USA 560, 564 (1982).

itation in § 103(b) that the copyright in a compilation “extends only to the material contributed by the author of such work, as distinguished from any preexisting material employed in such work.” *Rockford Map Publishers, Inc. v. Directory Service Co.*, 768 F.2d 145 (7th Cir.), *cert. denied*, 474 U.S. 1061 (1986). The close relationship in this respect between maps and compilations of data, including directories, was noted by this Court in *Mazer v. Stein*, 347 U.S. at 18.

The contribution of a compilation of data lies in its presentation, not in the facts themselves. The collector may change the form of information and so make it more accessible, or he may change the organization and so make the data more understandable. Thus a catalog of names and addresses is copyrightable, *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977), as is a directory of trade symbols, *Jewelers' Circular Pub. Co. v. Keystone Pub. Co.*, 274 F. 932 (S.D.N.Y. 1921) (L. Hand, J.), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922), and a compilation of logarithms, *Edwards & Deutsch Lithographing Co. v. Boorman*, 15 F.2d 35 (7th Cir. 1926). Petitioner's maps represent a similar compilation of data consisting of points on a map.

In *Rockford Map Publishers*, the court held that the plaintiff's map showing the location, size, and ownership of parcels of land in a county, was subject to valid copyright protection as a compilation of data. The court there stated:

[Defendant] may make all the plat maps it wants; everyone is free to repeat the facts contained in the deeds. *But it may not use [plaintiff's] work as the template.*

768 F.2d at 149 (emphasis added). The court in *Rockford Map Publishers* recognized the defendant's right to *examine* the plaintiff's data but held that the defendants could not engage in wholesale copying, stating:

All concede, as Learned Hand said in *Jewelers Circular*, 274 F. at 935, that "a second compiler may check back his independent work upon the original compilation." *The right to "check back" does not imply a right to start with the copyrighted work. Everyone must do the same basic work, the same "industrious collection."* "A subsequent compiler is bound to set about doing for himself what the first compiler has done." *Kelly v. Morris*, [1886] 1 Eq. 697, 701 (Wood, V.C.). The second compiler must assemble the material as if there had never been a first compilation; only then may the second compiler use the first as a check on error."

Id. (emphasis added).

The *Rockford Map Publishers* case illustrates the fact that copyright protection in a compilation of data does *not* present a threat of monopoly over the underlying facts. As stated by the leading scholar in this area:

[T]he grant of a monopoly on the compiler's particular chart . . . does not bar others from making the same calculations; it merely prevents others from copying directly. The monopoly is therefore of little prejudice to the public interest. *The argument is precisely the same in map cases.*

Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569, 1575 (1963) (emphasis added). "What the copyright monopoly here protects is . . . the effort, time, expense, and . . . the skill employed" in creating the map. *Id.* at 1570.

The Court of Appeals in the present case should have (1) recognized that Petitioner's 1:24,000 scale maps were validly copyrighted and (2) proceeded to determine whether Respondents' copying of the maps and commercial exploitation of the copies was an infringement. Instead the Court of Appeals independently and erroneously found that

recognition of copyright protection for Petitioner's maps would confer a monopoly on Petitioner over the "only approved pipeline route." 899 F.2d at 1464-65. As discussed below, the Court of Appeals directly contradicted the District Court in reaching this finding with no regard to its scope of appellate review and in direct violation of this Court's mandate in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

C. The Court of Appeals Ignored This Court's Instructions in *Pullman Standard* and *Inwood Laboratories* in Reversing the District Court's Factual Findings in Respect to the Validity of Petitioner's Copyrights.

Although the Fifth Circuit affirmed the District Court's denial of preliminary injunctive relief, it reversed the lower court's factual determination that Petitioner's 1:24,000 scale maps were subject to a valid copyright. The District Court found that such maps were validly copyrighted because they did *not* represent the only available expression of a 36-inch pipeline within the mile-wide approved corridor. The Court of Appeals disagreed, stating:

To extend copyright protection to the quad maps would grant [Petitioner] a monopoly over the only approved pipeline route.

Id. at 1464-65. In reaching this finding the Court of Appeals cited the conclusion of an administrative law judge in the proceedings before the FERC that the "Southern California . . . market could support only one pipeline." *Id.* at 1464. However, the Court of Appeals overlooked the District Court's finding that *any* party was free to place a pipeline anywhere within the mile-wide corridor and did not require the use of Petitioner's 1:24,000 maps to do so.¹²

¹² The District Court's Memorandum and Order dated July 17, 1989

In an effort to distinguish the single case most directly on point, *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.D.C. 1984),¹³ the Court of Appeals observed that in *WPOW* the information in the copyrighted work had been chosen from "an almost infinite number" of alternatives. The Court of Appeals then stated:

In contrast, the Commission [FERC] in the instant case at the time the copying occurred had approved *only one EIS corridor through which a pipeline could be built* without additional time-consuming and costly environmental study.

Id. (emphasis added). In this manner the Court of Appeals overturned the District Court's finding that *within* the EIS corridor it would have been equally possible to select "'an almost infinite number' of alternatives" without copying Petitioner's 1:24,000 scale maps. Thus, the Court of Appeals erroneously equated the mile-wide EIS corridor with Petitioner's placement of its proposed pipeline in that corridor, as expressed on the 1:24,000 scale maps.

The Court of Appeals never acknowledged that it was reversing a dispositive factual finding of the District Court and never considered whether the District Court's finding was "clearly erroneous" within the meaning of Fed.R.Civ.P. 52(a). Rule 52(a) provides in pertinent part:

contained a factual finding that *any* pipeline route located within the mile-wide EIS corridor was subject to approval by the FERC without the need for any further environmental analysis. See July 17, 1989 Memorandum and Order ¶¶ 8, 9, 12, 16, and 17 (App. 16a-17a).

¹³ In *WPOW* the plaintiff, an applicant before the Federal Communications Commission, submitted a copyrighted engineering report to the agency which the defendant copied and submitted in support of a subsequent competing application. The District Court in *WPOW* found copyright infringement and held that the author was entitled to a preliminary injunction impounding "all of defendants' materials which infringe plaintiff's engineering report and antenna design." 584 F. Supp. at 139.

Findings of fact . . . *shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

Fed.R.Civ.P. 52(a) (emphasis added).¹⁴

This Court has specifically instructed the Fifth Circuit to observe the requirements of Fed.R.Civ.P. 52(a) and refrain from vacating the factual findings of a district court in the absence of a specific determination that those findings are clearly erroneous. In reversing a decision of the Fifth Circuit which purported to set aside a finding of "ultimate fact" without applying the "clearly erroneous" standard set forth in Rule 52(a), this Court stated:

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's finding unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). In a companion case the Court stated further:

An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent."

¹⁴ Application of the "clearly erroneous" rule to copyright cases has historically been recognized. See *Sawyer v. Crowell Publishing Co.*, 142 F.2d 497, 499 (2d Cir. 1944).

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982), quoting *United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950).

The record in this case contains no support for the Fifth Circuit's factual finding that Petitioner has attempted to claim an exclusive right of appropriation over the entire mile-wide corridor within which its proposed 36-inch pipeline is to be located. The record clearly demonstrates to the contrary, and the District Court correctly found, that innumerable possibilities existed for placement of a specific pipeline within the mile-wide approved route. Petitioner has never claimed an exclusive right to any proposed route and has repeatedly acknowledged that Respondents were free to select the *exact* pipeline location depicted in Petitioner's 1:24,000 scale maps so long as Respondents performed their own survey work, created their own maps and did not copy Petitioner's maps.

The Fifth Circuit has now rendered a reported decision which negates the copyright protection historically afforded to maps and has fundamentally violated Fed.R.Civ.P. 52(a) in the process. As discussed below, the Court of Appeals reached its result in a vacuum because it refused to address the primary issue squarely presented to it, namely, whether a presumption of irreparable harm may be recognized by a district court for purposes of determining the availability of preliminary injunctive relief pursuant to Section 502(a) of the Copyright Act, 17 U.S.C. § 502(a).

II. THERE IS A DIRECT AND ACKNOWLEDGED CONFLICT OF AUTHORITY BETWEEN THE FIFTH CIRCUIT AND EVERY OTHER CIRCUIT TO CONSIDER THE AVAILABILITY OF A PRESUMPTION OF IRREPARABLE HARM UNDER SECTION 502(a) OF THE COPYRIGHT ACT.

One of the two issues squarely presented by Petitioner in its appeal to the Fifth Circuit was whether a district

court may recognize a presumption of irreparable harm for purposes of determining whether to issue a preliminary injunction pursuant to Section 502(a) of the Copyright Act. There is a direct and acknowledged conflict of authority among the Circuits on this question. In *Plains Cotton Co-operative Association v. Goodpasture Computer Service, Inc.*, 807 F. 2d 1256 (5th Cir.), *cert. denied*, 484 U.S. 821 (1987), the Fifth Circuit rejected the view of every other Circuit to consider the issue and held that, for purposes of determining the availability of preliminary injunctive relief in a case of copyright infringement, a presumption of irreparable harm is "not established in this Circuit." 807 F.2d at 1261, citing *Apple Barrel Productions*, 730 F.2d 384, 390 (5th Cir. 1984); *see also Southern Monorail Co. v. Robbins & Myers, Inc.*, 666 F.2d 185, 186 (5th Cir. 1982). Because the *Plains Cotton* holding conflicts with the law in every other Circuit to consider the issue, Petitioner urged the Court of Appeals to reconsider that holding as a predicate for considering the instant appeal. The Fifth Circuit summarily denied Petitioner's suggestion.

Application of the presumption of irreparable harm is critical in the present case. The District Court found each of the factual elements necessary for preliminary injunctive relief under Section 502(a). The District Court found that (1) the maps in question were subject to a valid and subsisting copyright; (2) Petitioner owned the copyright; and (3) Respondents copied all of Petitioner's approximately 140 copyrighted maps for more than 450 miles of the pipeline route to advance Respondents' own competitive and commercial interests. This is all that Petitioner was statutorily required to prove.¹⁵ Yet the District Court found

¹⁵ To prevail on a claim of copyright infringement, a plaintiff must prove (1) ownership of copyright and (2) copying by the alleged infringer. *M. Nimmer*, 3 *Nimmer on Copyright* § 13.01 (1980). The District Court in this case found that those elements were established.

that the evidence failed to establish a threat of irreparable harm.¹⁶

However, the damage resulting from copyright infringement is *inherently* irreparable because it lies in the author's loss of exclusive rights to the copyrighted work. "Unlike most property rights, the value of this interest is often fleeting." *Concrete Machinery Co. v. Classic Lawn Ornaments*, 843 F.2d 600, 611 (1st Cir. 1988). Consequently, this Court has recognized a presumption of irreparable harm in cases of commercial copyright infringement, stating:

Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed.

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (emphasis added).

¹⁶ The evidence of irreparable harm presented by Petitioner to the District Court consisted primarily of testimony establishing a substantial loss of future economic opportunity. The Court of Appeals acknowledged that the "Southern California . . . market could support only one pipeline." 899 F.2d at 464. Petitioner's witnesses testified that Petitioner was facing a substantial threat that it would lose the opportunity to construct that pipeline as a result of Respondents' copyright infringement. Additionally, there was evidence that Respondents' copying gained them significant advantages, in communications and negotiations with landowners and potential customers, independent of regulatory approval from the FERC. Finally, there was testimony that Petitioner experienced a significant loss of investment as a result of Respondents' infringement. Accordingly, in its appeal to the Fifth Circuit Petitioner contested the lower court's finding that the evidence failed to establish irreparable harm.

In determining whether to issue preliminary relief under Section 502(a), every court to consider the issue except the Fifth Circuit has held that a threat of irreparable harm should be presumed where, as in the present case, a prima facie case of copyright infringement is established. See 3 Nimmer, *Nimmer on Copyright*, § 14.06[A], n. 10 (1989). The presumption has been recognized by the United States Courts of Appeals for the First,¹⁷ Second,¹⁸ Third,¹⁹ Sixth,²⁰ Seventh,²¹ Eighth²² and Ninth²³ Circuits, as well as district courts in the Eleventh Circuit²⁴ and the District of Columbia Circuit.²⁵

¹⁷ *Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611-612 (1st Cir. 1988).

¹⁸ *Rushton v. Vitale*, 218 F.2d 434, 436 (2d Cir. 1955); *Uneeda Doll Co. v. Goldgarb Novelty Co.*, 373 F.2d 851, 852 (2d Cir. 1967); *Meredith Corp. v. Harper & Row Publishers, Inc.*, 378 F. Supp. 686, 691 (S.D.N.Y.), *aff'd*, 500 F.2d 1221 (2d Cir. 1974); *Hasbro Bradley v. Sparkle Toys, Inc.*, 780 F.2d 189, 192 (2d Cir. 1985); *Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 51-52 (2d Cir. 1989).

¹⁹ *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3d Cir.), *cert. dismissed*, 464 U.S. 1033 (1984).

²⁰ *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 267 (6th Cir. 1988); *Worlds of Wonder, Inc. v. Vector Intercontinental, Inc.*, 653 F. Supp. 135, 140 (N.D. Ohio 1986).

²¹ *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 620 (7th Cir. 1982), *cert. denied*, 459 U.S. 880 (1982); *Jackson v. MPI Home Video, Inc.*, 694 F. Supp. 483, 488 (N.D. Ill. 1988).

²² *West Publishing Co. v. Mead Data Center, Inc.*, 799 F.2d 1219, 1229 (8th Cir.), *cert. denied*, 479 U.S. 1070 (1986); *National Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726, 729 (8th Cir. 1986); *Hutchinson Telephone Co. v. Frontier Directory Co. of Minnesota, Inc.*, 640 F. Supp. 386, 388-89 (D. Minn. 1986).

²³ *Apple Computer, Inc. v. Formula International, Inc.*, 725 F.2d 521, 525-26 (9th Cir. 1984); *Walt Disney Productions v. Air Pirates*, 345 F. Supp. 108, 110 (N.D. Cal. 1972).

²⁴ *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc.*, 479 F. Supp. 351 (N.D. Ga. 1979); *O'Neill Developments, Inc. v. Galen Kilburn, Inc.*, 524 F. Supp. 710 (N.D. Ga. 1981); *Original Appalachian*

The Fifth Circuit stands alone in its refusal to consider the availability of such a presumption. In *Plains Cotton Cooperative Association v. Goodpasture Computer Service, Inc.*, 807 F. 2d 1256, 1261 (5th Cir. 1987), the Fifth Circuit rejected the opportunity to adopt the prevailing view with the terse statement that the presumption is "not established in this Circuit." 807 F.2d at 1261. For this reason, Petitioner filed a Suggestion for Hearing *En Banc* in this case, urging the Court of Appeals to reconsider its holding in *Plains Cotton*, but Petitioner's suggestion was summarily rejected.

The Court of Appeals was squarely confronted in this case with an issue as to which there is a direct and acknowledged conflict between the Fifth Circuit and all of the other appellate courts to consider that issue. The Court of Appeals improperly avoided this issue by overturning the factual conclusions of the District Court on the merger issue with complete disregard for the standard of review set forth in Fed.R.Civ.P. 52(a). However, the appellate court's refusal to consider the issue represents a ruling on the merits to the litigants before the court. The federal appellate mechanism was seriously undermined in this case, and the Supreme Court should grant a writ of certiorari to rectify the serious error of law which resulted.

III. THE COURT OF APPEALS VIOLATED THIS COURT'S INSTRUCTIONS IN *STEWART AND HARPER & ROW* BY REFUSING TO CONSIDER WHETHER RESPONDENTS' COPYING AND COMMERCIAL EXPLOITATION OF PETITIONER'S MAPS CONSTITUTED "FAIR USE" UNDER THE FACTORS SET FORTH IN SECTION 107 OF THE COPYRIGHT ACT.

All of the foregoing leads to the second issue which was squarely presented to, but ignored by, the Court of Appeals

Artworks, Inc. v. Topps Chewing Gum, Inc., 642 F. Supp. 1031, 231 USPQ 850 (N.D.Ga. 1986).

²⁵ *Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984); *WPOW v. MRLJ Enterprises*, 584 F. Supp. 32, 37 (D.D.C. 1984).

in this case. That issue is whether Respondents' copying of Petitioner's copyrighted maps and exploiting the copied maps as the basis for a competing pipeline proposal submitted to the FERC for regulatory approval, was a "fair use" within the meaning of Section 107 of the Copyright Act, 17 U.S.C. § 107. The District Court, without considering any of the statutory criteria set forth in Section 107, held that Respondents' copying of Petitioner's maps constituted "fair use" under the "totality of the circumstances," citing *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33, 39 (S.D. Tex. 1978).²⁶

The Copyright Act expressly identifies four factors which "shall be" considered in every fair use analysis: (1) the purpose and character of the use, including its commercial nature; (2) the nature of the copyrighted work; (3) the proportion that was taken; and (4) the economic impact of the taking. 17 U.S.C. §107. While these statutory factors are not the *only* factors which may be considered, this Court has stated that in determining whether fair use is established the district court "must consider" them. *Stewart v. Abend*, ___ U.S. ___, ___, 109 L.Ed.2d 184, 211 (1990) (emphasis added); *accord, Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. at 560.

²⁶ The *Key Maps* dispute arose when a fire marshal copied and distributed a composite fire zone map produced by a county engineer who drew lines on the plaintiff's copyrighted thoroughfare map. The court found fair use by the fire marshal because the use was noncommercial, the use did not diminish potential sales of the copyrighted maps, and a strong public interest supported dissemination of the fire zone maps to fire departments because the copyright proprietor had delayed supplying needed maps to the fire marshal's office after repeated requests. In contrast to *Key Maps*, Respondents' copying of Petitioner's 1:24,000 scale maps was purely commercial and had a substantial adverse effect on Petitioner's opportunity to market and ultimately build its proposed pipeline. No public interest such as fire safety justified Respondents' copying. *Key Maps* is clearly distinguishable from this case and, in any event, has been superseded by this Court's decisions in *Harper & Row* and *Stewart*, discussed below.

The District Court failed to consider or even mention the statutory factors and made no reference to the controlling law. Instead the District Court found fair use by determining that (1) Respondents' purported intent to copy only the EIS corridor rather than particular maps was permissible because the route itself was not subject to protection; and that (2) Respondents had no notice of Petitioner's copyright claims. Memorandum and Order at p. 7. The Court of Appeals avoided consideration of these factors by reversing the District Court's finding and by holding that Petitioner's 1:24,000 maps were not copy-rightable.

The District Court's ruling on fair use was the single substantive issue presented to the Fifth Circuit on appeal. The appellate court, therefore, under *Stewart and Harper & Row*, was required to consider the four statutory factors set forth in Section 107 of the Copyright Act. Since the District Court found facts sufficient to evaluate each of the statutory factors, this Court " 'need not remand for further fact-finding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.' " *Harper & Row*, 471 U.S. at 560, quoting *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984).

The "fair use" issue in this case is an important question of federal law, for the recognition of copyright protection in Petitioner's 1:24,000 maps would come to nothing if the lower court's finding on fair use were permitted to stand. Moreover, the District Court's application of the fair use defense based on "the totality of the circumstances," without more, removes any criteria for application of the defense and renders the doctrine exceedingly dangerous.

The fair use issue raised in this case is far reaching, for the public has a decided interest in the enforcement of copyright protection on behalf of one who is willing to invest his time and capital in a project of this scale. By

threatening to negate copyright protection for maps generally, the Court of Appeals' opinion raises an issue of exceptional importance in the natural gas industry which will certainly arise again unless resolved at this time.

If a copyright infringer is permitted to appropriate the maps or other works of authorship belonging to another party in connection with a competing proposal before the FERC or any other agency, parties who go before such agencies will not be willing to be the first to file or proceed because of the threat that their efforts will be exploited by a late-comer. As stated by a district court in enforcing the copyright of an applicant before an administrative agency under substantially identical facts:

As for the public interest, it . . . lies with the protection of the copyright laws. . . . Defendants argue that the public interest will be harmed by the removal of an otherwise qualified applicant in the pending proceedings . . . But defendants can hardly be deemed "qualified" on the basis of an application which is the copy of another applicant's work. Moreover, the public benefits they seek may not be obtained at the expense of the Copyright Act.

WPOW Inc. v. MRLJ Enterprises, 584 F. Supp. at 138-139. Similar considerations affecting the public interest justify a writ of certiorari in the present case.

CONCLUSION

This case presents larger issues than the aggravated injustice suffered by Petitioner as a result of the appellate court's capricious disposition of its appeal. In an effort to avoid confronting the issue of irreparable harm in respect to which it stands in direct conflict with every other Circuit to consider the issue, the Fifth Circuit extended the merger doctrine far beyond its historical application in a way which threatens the entire field of cartography by

undermining the copyright protection afforded to maps since the first copyright act of 1790. In doing so, the Court of Appeals reversed the factual determinations of the District Court with no regard to the "clearly erroneous" standard set forth in Fed.R.Civ.P. 52(a) or the instructions of this Court in *Pullman-Standard* and *Inwood Laboratories*.

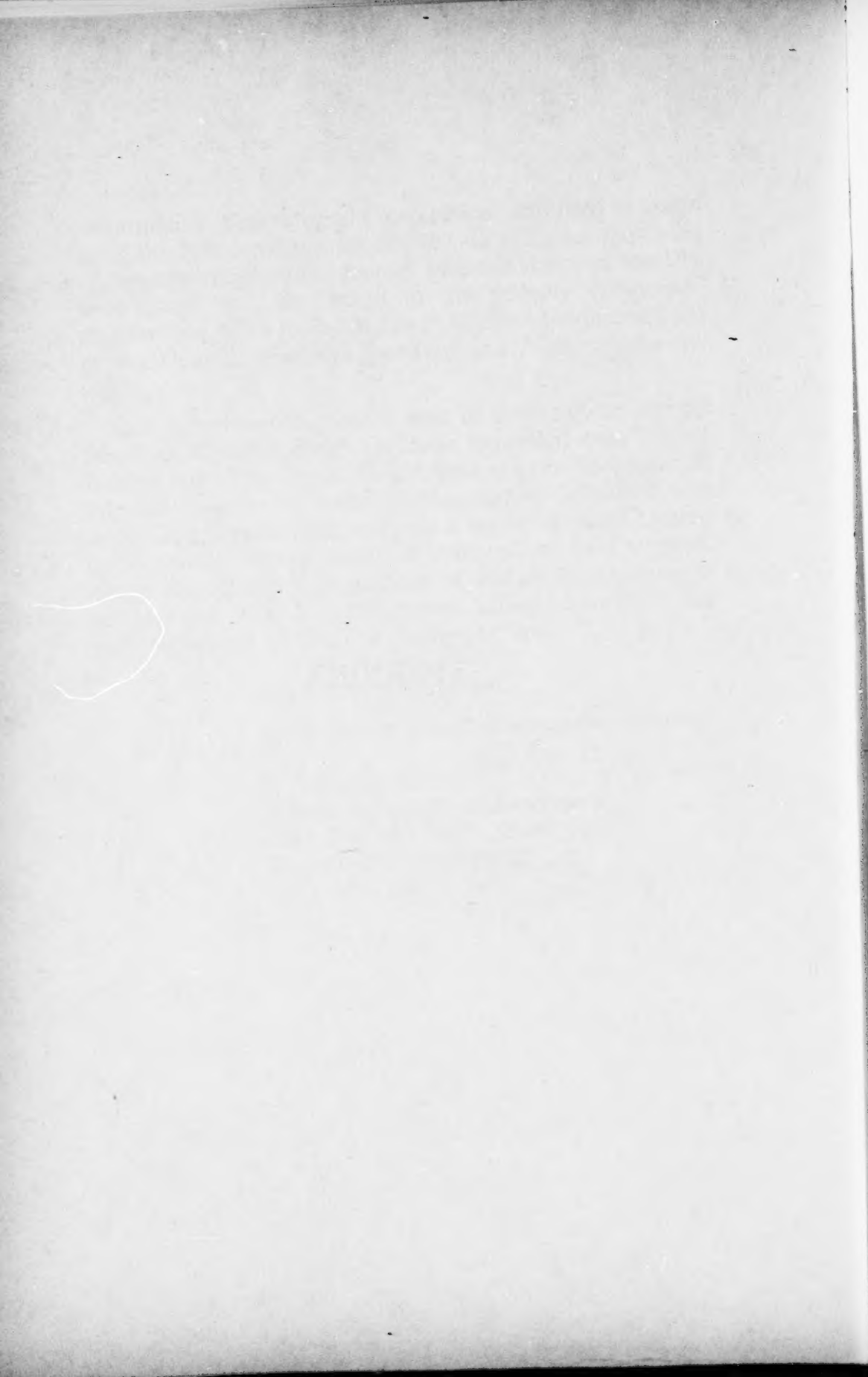
This Court should grant a writ of certiorari to correct the Fifth Circuit's errors on these important questions of federal law. The Court should also resolve the issue of fair use in order to make it clear that a defendant who copies and commercially exploits a series of maps created by a plaintiff as the result of independent field surveys, direct observation and millions of dollars in expense, is not immune from an infringement action under the "fair use" provisions of the U.S. copyright law.

Respectfully submitted,

KERN RIVER GAS TRANSMISSION COMPANY

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APPENDIX



UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

May 8, 1990

No. 89-2831

KERN RIVER GAS TRANSMISSION CO.,
Plaintiff-Appellant,

v.

THE COASTAL CORPORATION, *et al.*,
Defendants-Appellees.

Rehearing Denied June 15, 1990

J. Timothy Hobbs, Vincent M. Amberly, David C. Gryce, Mason, Fenwick, Lawrence, Washington, D.C., Alan H. Gordon, William D. Raman, Arnold, White, & Durkee, Houston, Tex., for plaintiff-appellant.

Robin C. Gibbs, Robert N. Brailas, Gibbs & Ratliff, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, THORNBERRY and JONES, Circuit Judges.

CLARK, Chief Judge:

Kern River Gas Transmission Company ("Kern River") brings an interlocutory appeal from the district court's denial of a preliminary injunction against Wyoming-California Pipeline Company ("Wy-Cal") under section 502(a) of the Copyright Act of 1976 (the "Act"), 17 U.S.C. §

502(a). By means of lines added to government survey maps, Kern River depicted the proposed route of a natural gas pipeline and submitted the maps to the Federal Energy Regulatory Commission (the "Commission") and other federal and state regulatory agencies in support of its application for authority to build the pipeline. Wy-Cal copied portions of the maps and submitted the copies to the Commission and other agencies in furtherance of its own application for authority to build a pipeline in the same corridor. The district court denied preliminary injunctive relief, holding that the proof did not establish the existence of a substantial threat of irreparable harm to Kern River, and that it showed Wy-Cal's use of the maps was fair use within the meaning of section 107 of the Act. Finding the maps at issue are not copyrightable under the Act, we affirm.

In the mid-1980s Kern River was engaged in intense competition with Mojave Pipeline Company for Commission approval to construct an interstate pipeline to supply natural gas to areas in and around Kern County, California. A large new market for natural gas had developed there among producers of heavy oil who burned gas to produce steam used in enhanced oil recovery. Kern River applied in 1985 to the Commission for a certificate of public convenience and necessity to construct a pipeline from southwestern Wyoming through Utah and Nevada to southern California. In May 1986 the Commission consolidated Kern River's application with that of Mojave, which had proposed to serve the southern California market by a different route, and ordered an administrative law judge to hold comparative evidentiary hearings. Among other findings, the ALJ predicted that the enhanced oil recovery market in southern California would be unable to support more than one interstate pipeline. *Public Utilities Comm'n v. FERC*, 900 F.2d 269, 283 (D.C.Cir. 1990).

In the course of preparing data requested by the Commission and other state and federal regulatory agencies,

Kern River drafted and submitted to the Commission several sets of maps depicting its entire proposed route and variations. Kern River submitted two sets of maps in October 1986, one set being on the scale of 1:250,000 (the "large-scale" maps), and the other at 1:24,000 (the "quad" maps). The quad maps are the focus of the copyright controversy here. They consisted of lines and mile markings drawn by Kern River on topographical maps published by the United States Geological Survey. Kern River developed the maps by conducting full, independent field work along every segment of the proposed route. Copies of Kern River's quad maps and the maps of its competitors were supplied to the Chambers Group, an environmental consultant under contract with the Commission and the California State Lands Commission to draft an environmental impact statement (EIS) describing and evaluating the pipeline construction and operation along the proposed route. Various other state and federal agencies as well as interested private parties received copies of the maps. Once submitted to the Commission, copies of the maps were available to all competitors who wished to study them.

In January 1987, the Chambers Group published a draft EIS. The document depicted among other things a mile-wide corridor running the length of Kern River's proposed route, as well as two variations proposed by Kern River known as the Wasatch and North Las Vegas Variations. The Commission's staff approved the EIS in December 1987. Staff approval was significant because any proposed pipeline constructed within the mile-wide corridor would require no further environmental study, whereas any route falling outside the corridor would be subject to further inquiry.

Wy-Cal applied to the Commission in August 1987 for a nonexclusive "Optional Expedited Certificate" pursuant to 18 C.F.R. Part 157, Subpart E. It proposed to adopt a 450-mile segment and other portions of Kern River's route. Wy-Cal drafted its own set of 1:250,000 maps in

support of its application and submitted them to the appropriate agencies. In February 1988 the Commission served a data request on Wy-Cal asking for quad maps for fifty-two miles of Wy-Cal's route in Wyoming and Nevada that were not common to any of the corridors approved in the EIS. Wy-Cal complied and also created quad maps depicting its entire route at the of the California State Lands Commission. Wy-Cal prepared all of these quad maps without reference to or use of any Kern River map. The Commission denied a motion to consolidate Wy-Cal's application with these of Kern River and Mojave.

In March 1988, after delivery of the requested maps to the Commission and the California State Lands Commission, the Chambers group notified Wy-Cal that the line drawn on their maps indicated Wy-Cal's proposed route still deviated from the EIS corridor in certain locations. Chambers permitted draftsmen employed by Colorado Interstate Gas Co., an affiliate of Wy-Cal and one of its codefendants below, to come to Chambers' Albuquerque, New Mexico headquarters to ascertain the exact location of the center line of the EIS corridor, and to plot that line onto their own maps. During the draftsmen's visit, Chambers Group personnel provided them with reduced-scale copies of Kern River's quad maps. The draftsmen copied the center line for the entire EIS-approved route as depicted on Kern River's quad maps. None of the maps contained a copyright notice and Wy-Cal had no notice of any copyright claim until Kern River brought this action in the district court. Kern River registered the quad maps with the Copyright Office in February 1988 when it determined that Wy-Cal had copied them.

The Commission issued a final certificate of public convenience and necessity to Wy-Cal in March 1989. Kern River then brought this action against Wy-Cal for copyright infringement and misappropriation. In Count One of its complaint, Kern River asserted that all of the maps it

had created and submitted to the Commission were copyrightable material and had been copied by Wy-Cal, causing Kern River "extreme damage." Kern River argued essentially that by copying and using the maps, which were created at great expense to Kern River, Wy-Cal obtained an expedited certificate enabling them to commence construction and sign customers that would have done business with Kern River. In addition to praying for damages, Kern River asked the court to impound the maps and Wy-Cal's certificate of public convenience and necessity and to enjoin Wy-Cal using from the maps for any purpose. In Count II, Kern River claimed that by "adopting" the Kern River Route, Wy-Cal had committed common-law misappropriation, gaining an unfair advantage in the race for Commission approval, rate-setting and solicitation of customers. The misappropriation count is not involved in this appeal.

Simultaneously with the filing of the complaint, Kern River moved for a temporary restraining order (TRO) under the Copyright Act to impound the copied maps and to enjoin Wy-Cal from using them for any purpose. The court granted the TRO. The court then held a hearing on Kern River's motion for a preliminary injunction after which it dissolved the TRO and denied the preliminary injunction. The court held that the large-scale maps represented the idea of the pipeline route and that the idea was inseparable from its expression; therefore these maps were not copyrightable. The court found, however, that the quad maps were copyrightable and that Wy-Cal had copied them. The court also found that Wy-Cal had copied Kern River's maps in April of 1989; thus Kern River presented no evidence showing that the copying influenced the Commission's decision to grant Wy-Cal its certificate in March 1989. The court further determined that Kern River could suffer no harm unless it was required to alter its proposed route, thereby requiring additional EIS work and Commission approval, and unless Kern River was is-

sued a certificate of public convenience and necessity under which it could commence construction. Thus, the court held Kern River had failed to prove a substantial threat of irreparable harm. Additionally, the court held that considering the "totality of the circumstances" Wy-Cal's use of the maps was fair use within the meaning of section 107 of the Act because Wy-Cal intended only to copy or adopt the Kern River route.

In December 1989, claiming there existed an irreconcilable conflict between our decision in *Plains Cotton Cooperative Ass'n v. Goodpasture Computer Service, Inc.*, 807 F.2d 1256 (5th Cir. 1987), and the decision of the Supreme Court of the United States in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984), Kern River filed a request in this court suggesting that we hear the appeal en banc in the first instance. We denied this extraordinary request.

In January 1990 the Commission granted Kern River a certificate of public convenience and necessity.

II

Kern River points out that the district court erred in finding no evidence connecting Wy-Cal's copying and the Commission's grant of a certificate to Wy-Cal, it being undisputed that Wy-Cal copied the maps in April of 1988, not 1989. Kern River also argues that under *Sony*, a court must presume the existence of a substantial threat of irreparable harm if it finds that copyrighted material has been copied. Kern River therefore urges that the district court erred in not presuming the existence of a threat of irreparable harm once it found that Wy-Cal had copied the quad maps. Finally, Kern River contends that the district court erred in finding fair use.

III

Spirited competition among several pipeline companies to serve the burgeoning demand for natural gas among

heavy oil producers conducting enhanced recovery in southern California drives the controversies between these pipelines. Their real battle is over which of them will serve this market. The merits of whether the Commission properly granted Wy-Cal its Optional Expedited Certificate and whether the Commission should have consolidated the applications of Wy-Cal, Kern River, and Mojave and required them to go head-to-head for the right of one to serve, have been decided by the United States Court of Appeals for the District of Columbia Circuit. The court affirmed the Commission's decision in all respects. *Public Utilities Comm'n, supra*. This copyright claim is no more than a harassing skirmish by Kern River against Wy-Cal in the larger fight for domination of this southern California market. We express no opinion to any issue that has been decided by or may later be presented to our sister circuit in that litigation.

The law controlling the issues raised here is well settled. A preliminary injunction may be granted under section 502 of the Copyright Act if the plaintiff establishes each of the following four factors: (1) a substantial likelihood that the plaintiff will succeed on the merits; (2) a substantial threat that the denial of the injunction will result in irreparable harm to the plaintiff; (3) the threatened injury to the plaintiff outweighs any damage that the injunction may cause to opposing parties; and (4) the injunction will not disserve the public interest. *Allied Mktg. Group, Inc. v. CD Mktg. Inc.*, 878 F.2d 806, 809 (5th Cir. 1989); *Apple Barrel Prod., Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984). The preliminary injunction is an extraordinary remedy and will be granted only if the movant has clearly carried the burden as to all four of the elements. *Allied Mktg.*, 878 F.2d at 809; *Apple Barrel*, 730 F.2d at 389.

The decision to grant an injunction is within the sound discretion of the trial court. We may reverse only if the trial court has abused its discretion. *Allied Marketing*, 878 F.2d at 809. The district court's determinations as to each

of the elements required for a preliminary injunction are mixed questions of fact and law, the facts of which we leave undisturbed unless clearly erroneous. *Apple Barrel*, 730 F.2d at 386. The conclusions of law are subject to broad, de novo review. *Id.*

The first issue for our consideration is whether Kern River will likely succeed on the merits. To state a prima facie case of copyright infringement, the plaintiff must prove ownership of copyrighted material and copying of that material by defendant. *Allied Marketing*, 978 F.2d 830; *Apple Barrel*, 730 F.2d at 387. "Ownership" is proved by establishing originality and copyrightability of the matter and compliance with statutory formalities. *Id.* at 810-11; *Apple Barrel*, 730 F.2d at 387. "Copying" may be shown by establishing that the defendant had access to the copyrighted material and that the defendant's work is substantially similar to the plaintiff's. *Id.* at 811.

The district court found that Kern River had created the lines locating its proposed pipeline route and properly registered the resulting quad maps, that the maps were copyrightable and that Wy-Cal had copied them. We agree that Kern River drafted the lines and properly registered the maps incorporating them, albeit after Wy-Cal copied the maps. However, the quad maps depicting the route are not subject to protection under the Copyright Act.

A

The Copyright Act reflects a tension created by Congress in balancing divergent public policies. Section 102(a), on one hand, provides in pertinent part that

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(5) pictorial, graphic, and sculptural works. . . .

17 U.S.C. § 102(a). Maps are included in the category of "pictorial, graphic, and sculptural works." Id. § 101. Section 102(b), on the other hand, provides that

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, *regardless of the form in which it is described, explained, illustrated, or embodied in such work.*

Id. § 102(b) (emphasis supplied). Thus, protection is extended to an expression of an idea fixed in a tangible form, but not to the idea itself regardless of the form in which it is fixed. In drawing this fundamental distinction, Congress balanced the competing concerns of providing incentive to authors to create and of fostering competition in such creativity. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir.1983) (citing *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977).

Courts have often found it difficult to draw the line between an idea and its expression. In his oft-cited "abstractions test," Judge Learned Hand in an infringement action between a playwright and an allegedly infringing movie studio explained that the difference between an idea and its expression is often a matter of degree:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may, perhaps, be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from

their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (citations omitted). "The guiding consideration in drawing the line [between an idea and its expression] is the preservation of the balance between competition and protection reflected in the patent and copyright laws." *Kalpajian*, 446 F.2d at 742.

The doctrine of "merger" developed in an effort to deal with this difficulty in locating the precise boundary between idea and expression. The doctrine holds that when the expression of an idea is inseparable from the idea itself, the expression and idea merge. "When the 'idea' and its 'expression' are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law." *Id.* (citing *Baker v. Selden*, 101 U.S. 99, 109, 25 L.Ed. 841 (1880)).

Thus, the district court held that the idea of the location of the pipeline and its expression embodied in the 1:250,000 maps are inseparable and not subject to protection. We agree. The idea of the proposed location of a prospective pipeline is not copyrightable. The 1:250,000 maps consisted of lines representing the proposed location of the pipeline drawn on maps sold to the general public. Such map markings are certainly the only effective way to convey the idea of the proposed location of a pipeline across 1,000 miles of terrain. To extend protection to the lines would be to grant Kern River a monopoly of the idea for locating a proposed pipeline in the chosen corridor, a foreclosure of competition that Congress could not have intended to sanction through copyright law, especially given the ALJ's finding in the Mojave/Kern River proceedings that the southern California enhanced oil recovery market could

support only one pipeline. The quad maps, drawn on a scale of 1:24,000, do not differ from the larger-scale maps to such a degree that copyright protection should attach. They also consist of lines representing the proposed location of a pipeline on standard reference, publicly available maps. Only the scale differs. And, just as with the 1:250,000 maps, the lines Kern River created express in the only effective manner the idea of the pipeline's location. Kern River's principal planning engineer testified that he could think of no other way to portray the idea of the pipeline's proposed location. The Commission's environmental approval of the route proposed by Kern River was neither private nor exclusive. Rather, it extended similar environmental approval to any applicant otherwise qualified to build a pipeline within the approved corridor. Just as with the 1:250,000 maps, Kern River may not invoke the Copyright Act to monopolize this proposed location for a pipeline.

The district court did find that Kern River conducted expensive and detailed field work to acquire the information needed to formulate mile-by-mile the precise location of their pipeline. Clearly, the consequent placement of locating lines on the 1:24,000 maps met the originality requirement of the Act. The problem for the copyrightability of the resulting maps however, is not a lack of originality, but rather that the maps created express in the only effective way the idea of the location of the pipeline.

Kern River urges that the reasoning employed in *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.D.C.1984) should control this case. We disagree. In *WPOW*, the plaintiff applied to the Federal Communications Commission to change its city of license and to build a transmitting antenna near the new city. 584 F. Supp. at 134. Included in its application was a detailed engineering report containing site coordinates, daytime and nighttime operating power, number of towers, tower

height, tower line bearing, tower spacing, tower current ratios, and transmission pattern shape and size. *Id.* & n. 5. After the plaintiff had submitted its application, the defendant submitted a competing application containing an engineering report identical to the plaintiffs in several particulars. *Id.*

The plaintiff brought an action for infringement. The court did not analyze whether the engineering report was copyrightable. Instead, it focused its analysis on whether the defendant's use was fair under 17 U.S.C. § 107. The *WPOW* court had no need to analyze whether merger of idea and expression occurred. In addition to proposing the location of the tower, the copyrighted report described numerous variable and detailed specifications for its construction, configuration and method of operation. These expressions were clearly separate from the idea of where to construct a transmitting tower. Moreover, the *WPOW* court found that the engineering report's specifications concerning the broadcasting radiation pattern were chosen from "an almost infinite number" of alternatives. Thus, there was no danger that granting copyright protection to the report would create a monopoly over the "idea" of broadcasting in a particular manner from a particular location. In contrast, the Commission in the instant case at the time the copying occurred had approved only one EIS corridor through which a pipeline could be built without additional time-consuming and costly environmental study. To extend copyright to the quad maps would grant Kern River a monopoly over the only approved pipeline route.

Since the quad maps in question are not copyrightable works, we need not reach the question whether Wy-Cal's use of the maps was fair use.

B

Kern River failed to show a substantial likelihood of success on the merits of its case for copyright infringement as its maps are not copyrightable. We pretermitt any de-

cision on whether Kern River has met its burden on the remaining elements of a prima facie case for a preliminary injunction, and as to the merits of Kern River's misappropriation count against Wy-Cal and the other defendants.

IV

The order of the district court denying the preliminary injunction is

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

CIVIL ACTION NO. H-89-0904

KERN RIVER GAS TRANSMISSION COMPANY,
Plaintiff,

VS.

THE COASTAL CORPORATION, COLORADO INTERSTATE
CORPORATION, COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY, COLORADO
INTERSTATE GAS WESTERN PIPELINE COMPANY AND
WYOMING-CALIFORNIA PIPELINE COMPANY,
Defendants.

MEMORANDUM AND ORDER

At the outset, this Court must place in perspective the narrow area of jurisdiction in which it may exercise authority. This Court notes that the issue to be addressed is whether the defendants should be enjoined for utilizing maps that the defendants developed as a result of copying of Plaintiff's maps. Any decision that this Court makes will not have the effect of impounding the certificate of public convenience and necessity that Wy-Cal has received; nor will it implicate the Natural Gas Act, impinge on the U.S. Court of Appeals jurisdiction, or curtail any order or report issued by the Federal Power Commission. Moreover, the fact that plaintiff seeks relief in this Court under one theory and the Court of Appeals utilizing the same factual basis or argument is of no moment. The relief sought in the Court of Appeals, if granted, may directly affect the defendants' optional certificate or its ability to proceed. In this regard, no jurisdictional conflicts exist

between this Court and the Court of Appeals or this Court and any federal agency.

In order for a party to prevail on a preliminary injunction the moving party must establish that: (1) there is a substantial likelihood that the moving party will prevail on the merits; (2) a substantial threat that irreparable injury will result if the injunction is not granted; (3) the threatened injury to the moving party, if the injunction does not issue, outweighs the threatened harm to the non-moving party upon issuance of the injunction; and (4) granting the injunction will not disturb the public interest.

It is the Court's conclusion that Kern River has failed to establish that irreparable injury will result if the injunction is not granted. The following are the findings of facts and conclusions of law associated with this holding.

FINDINGS OF FACT

1. The Kern River partnership was created by a "meeting of the minds" between Northwest Pipeline and Tenneco Inc. as early as mid-March 1985, with a subsequent written agreement reflecting the partnership's existence being signed on May 29, 1985. Employees assigned full-time to the Kern River Project and working under the direct supervision and control of the Kern River Partnership hierarchy drafted the first set of quad maps reflecting the proposed Kern River route starting in April 1985.

2. Pursuant to the Kern River partnership agreement, both Northwest Pipeline and Tenneco Inc. have been reimbursed for all expenses incurred on behalf of their subsidiaries or affiliates in relation to the Kern River Project, including the salaries of all employees assigned full-time to the Kern River project.

3. Plaintiff developed Kern River's Copyrighted Maps by conducting full, independent field work on every segment of its pipeline route from southwest Wyoming to Kern County, California.

4. Plaintiff's field work was conducted along all sections of its proposed pipeline route, including those segments which paralleled existing disturbances.

5. After Plaintiff's initial field investigation, employees of Northwest Pipeline and Tenneco Inc., assigned full-time to the Kern River Project, performed "pinpricking" of aerial photography taken along the proposed route. These "pin-pricked" maps were used to develop Kern River's 1986 Quad Maps.

6. Plaintiff has made a very limited distribution of its maps on a "need-to-know basis" and primarily to further the processing of its application to the FERC for a certificate of public convenience and necessity.

7. The FERC issued a final certificate of public convenience and necessity to Defendant Wy-Cal on March 15, 1989.

8. Defendant Wy-Cal's February, 1988 maps which were filed with Chambers and the FERC depicted substantial portions of Wy-Cal's proposed pipeline route to be outside of the approved EIS corridor.

9. As a result of being outside the corridor in its February 1988 Quad Maps, Defendants sent CIG draftsmen to the Chambers Group headquarters in Albuquerque, New Mexico to ascertain the exact location of the EIS corridor.

10. While in Albuquerque, New Mexico, the CIG draftsmen copied all Kern River maps reflecting the EIS corridor, including portions of Kern River's pipeline route in California clearly outside Wy-Cal's pipeline route as proposed to the FERC.

11. In addition to copying Kern River's proposed route between Mile Posts 50 and 500, Defendants have copied the entire Wasatch Variation and virtually all of the North Las Vegas Variation, both of which were developed entirely by Plaintiff Kern River.

12. In certain areas along Kern River's proposed pipeline route, geographical and topographical limitations could preclude two pipelines from being placed next to each other. Defendants' construction of a pipeline along the exact route depicted on Kern River's Copyrighted Maps could require Plaintiff Kern River to develop an alternative alignment at substantial cost which would be outside of the existing one mile wide EIS study corridor.
13. In January 1987, the Chambers group prepared and published the draft environmental impact statement (the "DEIS") in 4 volumes. These volumes established the Kern River Corridor in which each applicant's route is required to fall unless additional EIS studies are done.
14. On August 4, 1987, Wy-Cal filed an application with the FERC for an Optional Expedited Certificate.
15. In the Fall of 1987, Wy-Cal converted its Working Pencil Lines to a set of acetate overlays, on which the Wy-Cal proposed route was identified by removable map tape. These acetate overlays were created without reference to or use of any Kern River map.
16. In December of 1987, the FERC staff published the DEIS for, inter alia, the analysis corridor which Chambers had studied for the proposed Kern River route. Publication of the DEIS was significant in that it constituted FERC staff approval of the corridors and marked the end of environmental study of those corridors.
17. On December 14, 1987, the FERC gave notice that in light of Wy-Cal's decision to track existing analysis corridors for a large portion of its proposed route, the FERC would require environmental study only on those portions of the route (52 miles) which were represented to be outside of previously studied corridors.
18. In January 1988, Wy-Cal began to create 1:24,000 scale maps for those portions of its route which did not

track an existing analysis corridor as approved in the recently published DEIS.

19. On February 2, 1988, the FERC served a data request on Wy-Cal. It was the only data request the FERC served on Wy-Cal during its entire proceeding. It asked for quad maps for those portions of the route of Wy-Cal not represented to be common to the Kern River analysis corridor (primarily the stretch north of Interstate 80 in southwestern Wyoming), for the quad map which depicted each compressor station, and for its route in the vicinity of the Sunrise Mountain Instant Study Corridor. By reference to its 1:250,000 scale acetate overlays and the depiction on blank quad maps of existing disturbances, WyCal created the requested quads and included them in response to the data request. Thereafter, employing the same method, Wy-Cal prepared a complete set of quads (the February '88 Quads) for its entire route and sent that set out to the California State Lands Commission in connection with its right of way application. Wy-Cal prepared this set of quads without reference to or use of any Kern River maps.

20. On April 4, 1989, two Wy-Cal draftsmen visited the offices of Chambers in Albuquerque, New Mexico in order to plot the center line of the analysis corridors for the proposed Kern River and Mojave routes.

21. The maps provided to the draftsmen were, unbeknownst to Wy-Cal, a reduced scale version of what is referred to in this case as the Kern River 1986 Quads.

22. In creating the maps in Albuquerque, Wy-Cal reasonably believed that it was entitled to obtain the precise location of the center line of the analysis corridor.

23. Wy-Cal never had knowledge of claim of copyright in the maps prior to filing of this suit.

CONCLUSIONS OF LAW

Wy-Cal contends that Kern River is not the owner of the copyrights because it is not the owner of maps now the subject of the copyright claims. In this regard, Wy-Cal asserts that the maps do not qualify as works made for hire because the employees who performed the work were not employees of Kern River because no agreement existed between Kern River and Tenneco and Northwest Pipeline establishing ownership or the utilization of the corporations' employees. Additionally, Wy-Cal asserts that the Kern River's mapped route was copied from earlier works of different authors and are therefore not subject to copyright protection. This contention is without merit. Following this line of reasoning, work product of a person producing lines on a map would never be subject to copyright protection. Protection is sought for the lines drawn on the maps, not the United States Geologic Survey maps themselves. Every map that is ever made is a derivative to some degree. The fact that Kern River's route tracks portions of the Rocky Mountain route, the Ruchman-Painter Lateral, the Frontier Pipeline, the Mountain Fuel Pipeline and the All-American Pipeline is of no moment. The specific iterations on Kern River's maps are the result of its own work.

The Court agrees that the route that has been developed by Kern River is not subject to protection. However, Kern River's specific iterations on the maps representing its specific route may be the subject of copyright protection.

The Court is of the opinion that the Kern River route, as such, is an idea, expression of which is inseparable. Consequently, the doctrine of merger is applicable to the extent the larger maps, i.e., 1:250,000 scale maps, simply express or describe an idea. By this conclusion, the Court is holding that Wy-Cal could copy the 1:250,000 scale maps because they simply expressed an idea and in this size map the two are inseparable. The parties should note that

the mosaic map, Sluder Exh. 3, and other 1:250,000 scale map, would be viewed accordingly.

On the other hand, Wy-Cal should be barred from copying the 1:24,000 maps because the iterations and lines, although identical or nearly so, to prior unregistered 1985 quad maps, are copyrightable. It is the Court's view that a limited showing of the 1985 quad maps does not constitute publication. It is clear from the evidence that the 1:24,000 scale map were used on a very limited basis to satisfy environmental concern of the federal government as well as local government and civic associations. With the exception of the FERC, the quad map remained relatively unseen. In this regard, the Court concludes that no copies of the quad maps were sold, leased or given away such that publication was effected.

Assuming that each of Kern River's assertions are correct, no evidence was presented that Wy-Cal's copying of the Kern River's quad maps were necessary to the FERC approval process. It is noted that the certificate was issued to Wy-Cal on March 15, 1989 and that on April 4, 1989 the copying occurred. The evidence shows that Wy-Cal could have simply adopted the Kern River route and satisfied the application's requirements. The Court does not and is not ignoring the fact that copying was done, however. The Court is simply distinguishing between the adoption of the route and the copying of Kern River's iterations from the Kern River's 1:24,000 scale maps. At this point, the evidence does not establish the damages.

In this regard, considering the "totality of the circumstances," this Court concludes that the fair use doctrine is applicable. *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978). It is reasonable to conclude that Wy-Cal intended only to copy or adopt the Kern River route, which this Court concludes was permissible. Moreover, the evidence shows that Wy-Cal was unaware of any copyright claim at the time that the copying was done.

Based on these findings and conclusions, the Court is of the opinion that, while Kern River may have suffered damages and may prevail at the time of trial on the merits, those damages will exist only if Kern River is required to alter its route, thereby requiring additional EIS work and approval, and if Kern River is issued a certificate of public necessity and convenience with which construction may commence.

The temporary restraining order is DISSOLVED and the injunction is DENIED. All impounded documents are ORDERED returned.

SIGNED this / 17th / day of July, 1989.

/ s /

KENNETH M. HOYT

United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2831

KERN RIVER GAS TRANSMISSION CO.,
Plaintiff-Appellant,
versus
THE COASTAL CORPORATION, *ET AL.*,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING
(June 15, 1990)

Before CLARK, Chief Judge, THORNBERRY and JONES,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the same
is hereby denied.

ENTERED FOR THE COURT:

/s/ Charles Clark
United States Circuit Judge

CERTIFICATE OF COPYRIGHT REGISTRATION

[SEAL] This certificate, issued under the seal of the Copyright Office in accordance with the provisions of section 410(a) of title 17, United States Code, attests that copyright registration has been made for the work identified below. The information in this certificate has been made a part of the Copyright Office records.

FORM VA
UNITED STATES COPYRIGHT OFFICE
REGISTRATION NUMBER
VA 145 000
VAU

EFFECTIVE DATE OF REGISTRATION
February 7 1989

1 TITLE OF THIS WORK

KERN RIVER NATURAL GAS PIPELINE QUADRANGLE
MAPS - 1986

NATURE OF THIS WORK

Maps

. . .

2a NAME OF AUTHOR

Kern River Gas Transmission Company,
a Texas corporation

Was this contribution to the work a "work made for hire"?

Yes

AUTHOR'S NATIONALITY OR DOMICILE Name of
Country

Citizen of United States

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? No

Pseudonymous? No

NATURE OF AUTHORSHIP Briefly describe nature of the
material created by this author in which copyright is claimed.
Complete work

* * *

**3 YEAR IN WHICH CREATION OF THIS WORK WAS
COMPLETED** (This information must be given in all
cases.)

1986

**DATE AND NATION OF FIRST PUBLICATION OF THIS
PARTICULAR WORK** (Complete this information ONLY
if this work has been published)

Unpublished

4 COPYRIGHT CLAIMANT(S) Name and address must be
given even if the claimant is the same as the author
given in space 2.

Kern River Gas Transmission Company,
a Texas General Partnership
1010 Milam Street
Houston, Texas 77052

APPLICATION RECEIVED

FEB 07 1989

ONE DEPOSIT RECEIVED

FEB 07 1989

REMITTANCE NUMBER AND DATE

EXHIBIT D

- 5 PREVIOUS REGISTRATION** Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

No

* * *

- 6 DERIVATIVE WORK OR COMPILATION** Complete both space 6a & 6b for a derivative work; complete only 6b for a compilation.

- a. Preexisting Material** Identify any preexisting work or works that this work is based on or incorporates.

Ground coordinates and ground control from U. S. geological survey maps, topographical lines, roads and all cartographic features exclusive of materials added by Kern River Gas Transmission Company.

- b. Material Added to This Work** Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

Remainder of cartographic authorship, consisting of Kern River project pipeline routes, mileposts, and embellishments in proximity to the pipeline routes.

- 7 DEPOSIT ACCOUNT** If the registrtion fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account

Name: Mason, Fenwick & Lawrence

Account Number: 18-414

CORRESPONDENCE Give name and address to which correspondence about this application should be sent.

J. Timothy Hobbs

Mason, Fenwick & Lawrence

1225 Eye Street, N. W., Suite 1000

Washington, D. C. 20005

(202) 289-1200

8 CERTIFICATION* I, the undersigned, hereby certify that
I am the

authorized agent of Kern River Gas Transmission
Company

Name of author or other copyright
claimant, or owner of exclusive
right(s)

of the work identified in this application and that the
statements made by me in this application are correct
to the best of my knowledge.

Typed or printed name and date If this is a published
work, this date must be the same as or later than the
date of publication given in space 3.

J. Timothy Hobbs /s/ J. T Hobbs 07 Feb. 1989

9 MAIL CERTIFICATE TO

J. Timothy Hobbs, Esq.
c/o Mason, Fenwick & Lawrence
1225 Eye Street, N. W., Suite 1000
Washington, D. C. 20005

* 17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for a copyright registration provided for by section 409, or any written statement filed in connection with the application, shall be fined not more than \$2,500.



(2)

OCT 8 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 90-443

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ROBIN C. GIBBS
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Houston, Texas 77002
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Of Counsel:

ROBERT N. BRAILAS
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QUESTIONS PRESENTED

(1) Whether a mere line depicting a mile-wide environmental corridor within which Petitioner proposed to build a pipeline is subject to copyright protection in light of the doctrine of merger of idea and expression where (i) the line was drawn on pre-existing United States Geological Survey maps in the public domain, and (ii) Petitioner's own witnesses uniformly agreed that a line is the only way to depict the idea for the proposed pipeline route.

(2) Whether this Court should recognize a presumption of irreparable harm in copyright actions seeking a preliminary injunction, when in the pending case (i) this issue was never reached by either the district court or the court of appeals, and (ii) Respondents rebutted any conceivable presumption of irreparable harm.

(3) Whether this Court should determine that a single innocent act of copying of Petitioner's maps by Respondents constituted "fair use" in a case where (i) Respondents had no notice of a copyright claim by Petitioner, (ii) the maps in question contained no copyright notice and were not even registered with the Copyright Office at the time, and (iii) this issue was never reached or addressed by the lower appellate court.

PARENT AND SUBSIDIARY CORPORATIONS

The following list of Respondents' parent and subsidiary corporations is provided pursuant to Rule 29.1 of the Supreme Court Rules:

- ABCO Aviation, Inc.
- ABCO Leasing, Inc.
- ANG Coal Gasification Company
- ANR Coal Company
- ANR Credit Corporation
- ANR Development Corporation
- ANR Eastern Pipeline Company
- ANR Energy Conversion Company
- ANR Finance B.V.
- ANR Finance N.V.
- ANR Foundation, Inc.
- ANR Freight System Canada Inc.
- ANR Freight System, Inc.
- ANRFS Holdings, Inc.
- ANR Gasification Properties Company
- ANR Gathering Company
- ANR Gulf Pipeline Company
- ANR Intrastate Gas Company, Inc.
- ANR Limited Inc.
- ANR Media Company
- ANR Michigan Storage Company
- ANR One Woodward Corp.
- ANR Pipeline Company
- ANR Production Company
- ANR Ren-Cen, Inc.
- ANR Southern Pipeline Company
- ANR Storage Company
- ANR Supply Company
- ANR Technology Company
- ANR Transmission Company
- ANR Venture Bound Brook Company
- ANR Venture Eagle Point Company
- ANR Venture Management Company
- ANR Western Coal Development Company

ANR Western Storage Company
American Natural Alaskan Company
American Natural Offshore Company
American Natural Resources Company
Apache Mining Company
The Belcher Company of New York, Inc.
The Belcher Company of Tennessee, Inc.
Belcher New England, Inc.
Belcher of South Boston, Inc.
Belcher Oil Company
Belcher Refining Company
Belcher Terminals, Inc.
Belcher Towing Company
Border Exploration Company
Brooks Run Coal Company
Cat Run Coal Company
CIC Industries, Inc.
CIG-Canyon Compression Company
CIG Exploration, Inc.
CIG Gas Supply Company
CIG Overthrust, Inc.
CIG Western Pipeline Company
Coastal Belcher Petroleum Pte. Ltd.
Coastal (Bermuda) Limited
Coastal Border Gas Sales, Inc.
Coastal Capital Corporation
Coastal Coal Sales, Inc.
Coastal Eagle Point Oil Company
Coastal Energy Corporation
Coastal Finance Corporation
Coastal Financial Antilles N.V.
Coastal Financial B.V.
Coastal Holding Corporation
Coastal Libya Exploration Limited
Coastal Limited Ventures, Inc.
Coastal Management Services (Singapore) Pte. Ltd.
Coastal Mart, Inc.
Coastal Midland, Inc.
Coastal Netherlands Financial B.V.
Coastal Offshore Insurance Ltd.

Coastal Oil & Gas Corporation
Coastal Petrochemical Co., Inc.
Coastal Petroleum (Far East) Pte. Ltd.
Coastal Pipeline Company
Coastal Refinery Marketing B.V.
Coastal Refining Company
Coastal Refining & Marketing, Inc.
Coastal States Crude Gathering Company
Coastal States Energy Company
Coastal States Gas Transmission Company
Coastal States Holding (U.K.) Limited
Coastal States Industrial Sales Company
Coastal States Management Corporation
Coastal States Petroleum (Espana) S.A.
Coastal States Petroleum (U.K.) Limited
Coastal States Tankers (U.K.) Limited
Coastal States Trading, Inc.
Coastal Tankships U.S.A., Inc.
Coastal Uranium, Inc.
Coastal Ventures, Inc.
Coastal Western Pipeline Company
Cody Gas Company
Colbourne Insurance Company, Inc.
Colbourne Insurance Company Limited
Cosbel Petroleum Corporation
Coscol Marine Corporation
Coscol Petroleum Corporation
Costa Petro
Derby Realty Corporation
Derby Refining Company
Geogas Enterprise S.A.
GLGT, Inc.
Great Lakes Gas Transmission Company
Holborn Oil Company Limited
Holborn Oil Trading Limited
Jayhawk Pipeline Corporation
Joy Food Stores, Inc.
Manatee Towing Company
Mountain Industrial Gas Company
Pacific Refining Company

Road Equipment
Skyline Coal Company
Southern Utah Fuel Company
Stonehurst Limited
Sunshine Natural Gas System
TND Beverage Corporation
Texas Tank Ship Agency, Inc.
Texcol Gas Services, Inc.
Transport USA, Inc.
Unique Mining Systems, Inc.
Utah Fuel Company
Virginia City Coal Company
Virginia Iron, Coal and Coke Company
Western Fuel Oil Company
Wycon Chemical Company
Wycon Sales Company
Wyoming Gas Supply, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARENT AND SUBSIDIARY CORPORATIONS	ii
TABLE OF CONTENTS	vi
TABLE OF AUTHORITIES	vii
STATEMENT OF THE CASE	1
A. Factual Background	1
B. Procedural Background	5
ARGUMENT	8
A. A Mere Line on a Map Depicting a Proposed Pipeline Route is not Subject to Copyright Protection	8
B. There is No Clear Conflict in the Circuits on a Presumption of Irreparable Harm; this Issue Was not even Reached by the Lower Courts; and any such Presumption Was Rebutted in the Pending Cause	14
C. The Court of Appeals Did Not Even Reach, Much Less Violate, This Court's Interpretations of the "Fair Use" Defense Under Section 107 of the Copyright Act	19
CONCLUSION	22

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Apple Barrel Productions, Inc. v. Beard</i> , 730 F.2d 384, (5th Cir. 1984)	7, 15
<i>Atlanta Gas Light Co. v. Federal Power Commission</i> , 476 F.2d 142 (5th Cir. 1973)	6
<i>Baker v. Selden</i> , 101 U.S. 99 (1879)	11
<i>Colautti v. Franklin</i> , 439 U.S. 379 (1979)	19
<i>Community for Creative Non-Violence v. Reid</i> , 109 S. Ct. 2166 (1989)	6
<i>Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.</i> , 843 F.2d 600 (1st Cir. 1988)	17
<i>Deerfield Medical Center v. City of Deerfield Beach</i> , 661 F.2d 328 (5th Cir. 1981)	17
<i>Harper & Row Publishers v. Nation Enterprises</i> , 471 U.S. 539, 552 (1985)	20
<i>Herbert Rosenthal Jewelry Corp. v. Kalpakian</i> , 446 F.2d 738 (9th Cir. 1971)	9
<i>Holley Sugar Corp. v. Goshen County Co-Op Beet Growers Association</i> , 725 F.2d 564 (10th Cir. 1984)	17
<i>In re Feit & Drexler, Inc.</i> 760 F.2d 406 (2d Cir. 1985)	17
<i>J. Truett Payne Co. v. Chrysler Motors Corp.</i> , 451 U.S. 557 (1981)	15
<i>Key Maps, Inc. v. Pruitt</i> , 470 F. Supp. 33 (S.D. Tex. 1978)	20
<i>M. Kramer Manufacturing Co. v. Andrews</i> , 783 F.2d 421 (4th Cir. 1986)	9
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	11
<i>New York Tribune, Inc. v. Otis & Co.</i> , 39 F. Supp. 67 (S.D. N.Y. 1941)	20
<i>Patrick v. Bruget</i> , 486 U.S. 94 (1988)	15
<i>Plains Cotton Co-Operative Association v. Goodpasture Computer Service, Inc.</i> , 807 F.2d 1256 (5th Cir. 1987)	15
<i>Rockford Map Publishing, Inc. v. Directory Service Co.</i> 768 F.2d 145 (7th Cir.), <i>cert denied</i> , 474 U.S. 1061 (1986)	11, 12
<i>Rushton v. Vitale</i> , 218 F.2d 434 (2d. Cir. 1955)	17

	PAGE
<i>Sony Corporation of America v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984)	18, 20
<i>Stuart v. Abend</i> , 110 S.Ct. 1750 (1990)	20
<i>Terrell v. University of Texas System Police</i> , 792 F.2d 1360 (5th Cir. 1986), <i>cert. denied</i> , 479 U.S. 1064 (1987)	19
<i>Toro Co. v. R & R Products Co.</i> , 787 F.2d 1208 (8th Cir. 1986)	9
<i>Uneeda Doll Co. v. Goldfarb Novelty Co.</i> , 373 F.2d 851 (2d. Cir.), <i>cert. dism'd</i> , 389 U.S. 801, (1967)	17
<i>United States v. Mississippi Valley Generating Co.</i> , 364 U.S. 520 (1961)	12

STATUTORY PROVISIONS AND PROCEDURAL RULES

15 U.S.C. § 717r(b)	6
17 U.S.C. § 101	6
17 U.S.C. § 102	8
17 U.S.C. § 103	8
17 U.S.C. § 107	19
17 U.S.C. § 201	6
17 U.S.C. § 405(a)	6
17 U.S.C. § 502(a)	18
Fed. R. Civ. P. 52(a)	12
18 C.F.R. § 157, Subpart E	2

OTHER AUTHORITIES

C. Wright, A. Miller & E. Cooper, <i>Federal Practice & Procedure</i> § 4036	15
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ABBREVIATIONS

Record	R.
Reporter's Transcript of Proceeding	Tr.
Defendant's Exhibit	Def. Exh.
Appendix to Supreme Court Petition	App.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Kern River Gas Transmission Company ("Kern River") and Respondent Wyoming-California Pipeline Company ("Wy-Cal") have over the past several years sought regulatory approval from the Federal Energy Regulatory Commission ("FERC") to construct a natural gas pipeline from Wyoming to California. In the course of pursuing this project, pipeline routes were plotted on numerous pre-existing maps for use by Kern River in connection with seeking regulatory approval and for other purposes.¹

In May of 1985, Kern River filed with the FERC an application for a certificate of public convenience and necessity to construct the proposed pipeline. In 1985 and 1986, dozens of copies of the maps were generated and provided to the FERC, potential customers, land owners and other parties with a possible interest in the pipeline. Originally, the pipeline routes in issue in this suit were plotted on maps in one of two different scales — a 1:250,000 scale and a 1:24,000 scale, the latter better known as "quad maps."

In January of 1987, at the request of the FERC, The Chambers Group, a private environmental consulting company, prepared a draft environmental impact statement constituting an environmental review of Kern River's proposed route and establishing a mile-wide corridor with the Kern River route as the centerline.

¹ Respondents urged in the courts below and continue to believe that Kern River is not the true "owner" of the maps in issue for purposes of the federal copyright laws. For purposes of convenience only, this Brief in Opposition sometimes refers to the maps as the "Kern River maps" or "Kern River's maps."

In August of 1987, Wy-Cal also filed an application with the FERC for approval to construct a competitive pipeline. Unlike Kern River, Wy-Cal chose to pursue its application under an "optional expedited certificate" ("OEC") application process adopted by the FERC in 1985. See 18 C.F.R. § 157, Subpart E. The OEC procedure was designed to streamline and substantially shorten the procedures for obtaining a certificate.

In December of 1987, the FERC published the final environmental impact statement ("FEIS") approving the environmental corridor developed by The Chambers Group. The effect of the issuance of the FEIS was that the FERC staff concluded that the construction of a pipeline within the corridor was environmentally acceptable subject to certain mitigation requirements. On December 14, 1987, the FERC gave notice that it would not require an environmental study for portions of the proposed Wy-Cal route that were within one or more previously approved environmental corridors. In January of 1988, Wy-Cal began to create its own quad maps for portions of its proposed route which were outside any approved corridor.

In February of 1988, the FERC served a data request upon Wy-Cal. It asked for quad maps for those portions of the Wy-Cal route not represented to be in common with The Chambers Group/Kern River analysis corridor, as well as maps for a few other specific locations. Wy-Cal created the requested quad maps and included them in response to the data request. As was the case in its original application maps, Wy-Cal prepared all of these maps without reference to or use of any maps alleged to be subject to copyright protection by Kern River.

In March of 1988, The Chambers Group advised Wy-Cal that certain of its maps reflecting adoption of the Kern River analysis corridor deviated from that corridor. The Chambers Group arranged with Wy-Cal for Wy-Cal representatives to visit

The Chambers Group office in Albuquerque in order to plot accurately the centerline of the FEIS corridor.

On April 4, 1988, two Wy-Cal draftsmen visited the offices of the Chambers Group to plot the centerline of the Kern River corridor. The purpose of this visit was solely to obtain the centerline of the analysis corridor in order to assure that Wy-Cal's proposed route fell within the approved environmental corridor. Without identifying their source, The Chambers Group provided certain maps which were a reduced version of the 1986 quad maps for which Kern River later obtained copyright registrations. The Wy-Cal draftsmen were unaware of where the maps came from, and Wy-Cal reasonably believed that it was entitled to obtain the precise location of the centerline of the analysis corridor it had adopted. Wy-Cal's draftsmen plotted on blank pages the centerline of the corridor as reflected by the maps provided by The Chambers Group. Wy-Cal never had knowledge of a claimed copyright on the maps prior to the filing of this suit, which occurred almost a year after the trip to Albuquerque.

Kern River suggests in its Petition that there is some meaningful distinction, for federal copyright purposes, between the 1:250,000 scale maps, for which it has abandoned its copyright claims, and the 1:24,000 scale quad maps. Kern River seems to suggest that a mile-wide environmental corridor was first approved by the FERC, and that Kern River then returned to its drawing boards and developed the precise route for its proposed pipeline. In fact, the opposite occurred. The environmentally approved mile-wide corridor simply reflects a corridor with the proposed Kern River pipeline route as its centerline. Wy-Cal wished to be within the corridor, but was not interested in tracking precisely the Kern River route. Nor could the proposed Kern River route as depicted on its quad maps possibly depict the *exact* location of a 36-inch pipeline which might ultimately be built as Kern River argues. The very width of the line would

measure some 100 feet on the ground, given the scale of the maps on which they were drawn.

In addition, the copies of the maps resulting from the April 4, 1988 Albuquerque incident were not required for Wy-Cal to obtain a FERC certificate. Resolving the apparent deviation of Wy-Cal's proposed route from the approved analysis corridor did not require maps at all. The FERC's regulations have no such requirement. Two witnesses testified that there was no need to submit new maps. Kern River admitted in its own pleadings that it was not necessary for Respondents to submit new maps in order to satisfy Chambers: "They needed merely to indicate orally their intention to follow the Kern River route and that would have sufficed." R. Tab 75 at p. 17

In January of 1989, the FERC entered an order indicating that it intended to grant Wy-Cal its optional expedited certificate. Faced with its competitor's certification to begin construction and still awaiting favorable action on its own request for a certificate, Kern River obtained copyright registrations on a large number of quad maps and 1:250,000 scale maps that had been used in connection with Kern River's FERC filings. The pending litigation was commenced shortly thereafter alleging copyright infringement. Although these maps had been generated in 1985 and 1986, Kern River sought no copyright protection and never advised anyone of its alleged copyrights until after the FERC indicated it was granting a certificate to Wy-Cal three or four years later. Wy-Cal believes that the sole purpose of obtaining the copyright registrations was to obtain a competitive advantage in the pipeline competition through a copyright infringement action. In preparing its application for its certificate, and in responding to the FERC's one data request, Wy-Cal used maps which were generated without referring to any maps later registered by Kern River.

There was no evidence presented that Wy-Cal's application with the FERC in any way delayed or hindered a ruling on Kern River's application, nor was there any evidence that, in the absence of Wy-Cal's sole, innocent act of preparing its own set of quad maps in Albuquerque, Wy-Cal would not have received its certificate. All of the evidence was to the contrary, and at the time of the injunction hearing Kern River's application with the FERC was still pending.

B. Procedural Background

Petitioner initiated this action by bringing suit against Respondents for federal copyright infringement and state law misappropriation in the United States District Court for the Southern District of Texas on March 20, 1989. Petitioner sought a temporary restraining order, a preliminary injunction, and an impoundment order under the federal copyright laws seeking, *inter alia*, impoundment of the certificate issued by the FERC. After giving Respondents only about twenty-four hours notice of a TRO hearing, Kern River obtained a temporary restraining order from the Bench on March 22, 1989, which was followed by a written TRO and impoundment order on March 28, 1989. The TRO and impoundment order covered certain Kern River quad maps as well as certain of its 1:250,000 scale maps.²

In May of 1989 the district court conducted a thorough five-day evidentiary hearing on Kern River's request for a preliminary injunction and impoundment order. Both sides submitted extensive briefs and exhibits prior to and following the injunction

² In its Supreme Court Petition, Kern River abandons any argument that the 1:250,000 scale maps are subject to copyright protection.

hearing. Respondents asserted numerous grounds for denying the request for injunctive relief, which can be summarized as follows:

(1) Kern River sought to impound the certificate issued to Wy-Cal by the FERC and to enjoin the use of the benefits of that certificate. The validity of the certificate and Kern River's claim that Wy-Cal had misappropriated its route had been directly raised in FERC proceedings which were at the time on appeal to the United States Court of Appeals for the District of Columbia. Under 15 U.S.C. § 717r(b), the district court in Texas did not have jurisdiction to grant the relief requested. *See, e.g., Atlanta Gas Light Co. v. Federal Power Commission*, 476 F.2d 142 (5th Cir. 1973).

(2) Kern River was not the owner of the copyrights, since employees of other corporate entities had actually prepared the maps. The maps did not qualify as "works made for hire" under 17 U.S.C. §§ 101 and 201, and this Court's interpretation of those statutes in *Community for Creative Non-Violence v. Reid*, 109 S. Ct. 2166 (1989).

(3) Most or all of the mapped route was copied from earlier works by different authors and was therefore not subject to copyright protection. *See* 17 U.S.C. § 103(b).

(4) Under the merger doctrine, the lines on Kern River's USGS maps were not subject to copyright protection.

(5) Kern River's copyrights were invalid due to prior publication and failure to cure. *See* 17 U.S.C. § 405(a).

(6) Kern River had established no causal link between the alleged copying and any alleged injury.

(7) Respondents' activities were privileged under the fair use and implied license doctrines.

(8) Kern River's claims were subject to the defenses of estoppel and laches.

(9) Kern River would not be irreparably harmed if the injunction were denied.

(10) Since Kern River insisted that only one pipeline could be built due to economic realities, Kern River could not establish that the balance of hardships weighed in its favor under Fifth Circuit precedent. *See Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 389-90 (5th Cir. 1984).

(11) Kern River could not establish that granting the injunction would serve the public interest, a separate element to be considered by the district court in ruling on injunction matters. The FERC was created to determine which energy-related projects would best serve the public interest. It had conducted extensive hearings on the competing applications for FERC certificates, and had concluded that Respondent Wy-Cal should be granted a certificate.

On July 18, 1989, the district court entered a memorandum and order dissolving the temporary restraining order, denying the request for preliminary injunctive relief, and ordering the return to Respondents of all documents previously impounded. App. 14a. The Court concluded as follows:

(1) As to the 1:250,000 scale maps, the doctrine of merger applied.

(2) As to the quad maps, the fair use doctrine was applicable.

(3) Not only was there no irreparable harm resulting from Respondents' alleged acts of copying, but Kern River had suffered no damages, irreparable or otherwise, as a result of these alleged acts.

App. 19a-21a.

On May 8, 1990, the Fifth Circuit issued its opinion in the appeal of the denial of the preliminary injunction. App. 1a. The Court reached only the issue of the applicability of the merger doctrine, and concluded that all of Kern River's maps, including the quad maps, were not subject to copyright protection by virtue of that doctrine. Having found no substantial likelihood of success on the merits, the Fifth Circuit expressly pretermitted a decision on the fair use defense, and "any decision on whether Kern River has met its burden on the remaining elements of a prima facie case for a preliminary injunction" App. 12a-13a. The Fifth Circuit pointed out that "[t]his copyright claim is no more than a harassing skirmish by Kern River against Wy-Cal in the larger fight for domination of this southern California market." App. 7a.

ARGUMENT

A. A Mere Line on a Map Depicting a Proposed Pipeline Route is Not Subject to Copyright Protection

There is no basis for Petitioner's claims that the Fifth Circuit's decision in this case "negates copyright protection for all maps," and "extends the merger doctrine in a manner which precludes copyright protection for maps in general." Petition at 11-12. Neither Respondents nor the courts below have ever remotely suggested that maps in general are not subject to copyright protection. Whether maps are treated as pictorial or graphic works under 17 U.S.C. § 102, or compilations or derivative works under 17 U.S.C. § 103, no one can dispute that maps in general are subject to copyright protection.

What the Fifth Circuit held, and what Respondents contend, is that a mere line depicting a proposed pipeline route on pre-existing USGS maps in the public domain cannot be copyrighted.

The Copyright Act provides in 17 U.S.C. § 102(b): “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.” This fundamental provision of the Copyright Act states “the basic dichotomy between expression and idea.” 17 U.S.C.A. § 102 note.

Since the copyright laws do not protect ideas, but only the expression of those ideas, the courts have developed the doctrine of merger. Under this doctrine, copyright protection is not available in situations where the idea and expression of that idea become merged, i.e., are one and the same. Where a particular form of expression is an indispensable method of communicating the underlying information, no copyright protection in that form of expression is afforded the author. “Where the ‘idea’ and its ‘expression’ are thus inseparable, copying the ‘expression’ will not be barred, since protecting the ‘expression’ in such circumstances would confer a monopoly of the ‘idea’ upon the copyright owner free of the conditions and limitations imposed by the patent law.” *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971). “Under the copyright doctrine of merger . . . copyright protection will be denied even to some *expressions* of ideas if the idea behind the expression is such that it can be expressed only in a very limited number of ways.” *Toro Co. v. R & R Products Co.*, 787 F.2d 1208, 1212 (8th Cir. 1986) (emphasis in original). “If there is only one way to express the idea, ‘idea’ and ‘expression’ merge and there is no copyrightable material.” *M. Kramer Manufacturing Co. v. Andrews*, 783 F.2d 421, 436 (4th Cir. 1986).

Kern River’s proposed pipeline route is a paradigm example of the merger of idea and expression. There is simply no other way to express Kern River’s idea — its proposed route for the

pipeline on pre-existing USGS maps — than to draw lines on such maps. Kern River's witnesses repeatedly agreed with this proposition.³ Edwin Harris, the engineer responsible for the overall direction and coordination of engineering on Plaintiff's project, explained:

Q: How else could that route have been expressed on a USGS map other than how you did it with a single line?

A: To the accuracy we desired, I don't know of another way that I would have done it.

Q: That line is the only way of expressing the ideas embodied in your route, right?

A: That's the only way I would have done it.

Q: Can you think of any other way?

A: No, sir.

Kern River's Project Manager Wadlington testified that the reason a line on the maps was used to express the pipeline route was because he does not "know any other way to do it." Kern River's co-manager Muse similarly stated: "I can't imagine of anything else but a line." Kern River's supervisor of engineering, Robert Sluder, also confirmed the obvious: "A pipeline is a linear facility. . . . I don't know of any other way to express a linear facility than by lines." Sluder later testified: "As far as our idea of our pipeline route for us to express it on a map, the only way for us to do that on a map is to express it as a line." Respondents submit that in the case of a pipeline route, which is only proposed and has no existence in the real world, the idea and the expression of the idea through a line on each quad map are one and the same.

³ Def. Exh. 162 at 128-29; Wadlington Dep. at 146; Muse Dep. at 59; Def. Exh. 165 at 121, 123-24; Tr. 243.

The cases cited by Petitioner do not support their contention that the merger doctrine is inapplicable here. *Mazer v. Stein*, 347 U.S. 201 (1954) held that male and female dancing figurines made of china and used as lamp bases could be copyrighted. Obviously, there are infinite ways to depict dancing human figurines. Similarly, *Rockford Map Publishing, Inc. v. Directory Service Co.*, 768 F.2d 145 (7th Cir.), *cert. denied*, 474 U.S. 1061 (1986), held that a plat map was copyrightable. The court stated that “[t]he contribution of a collection of facts lies in their presentation, not in the facts themselves. The collector may change the form of information and so make it more accessible, or he may change the organization and so make the data more understandable.” *Id.* at 149. Neither *Mazer* nor *Rockford Map Publishers* addressed the doctrine of merger, nor would such a discussion have been appropriate under the facts of those cases.

A more apposite case is *Baker v. Seldon*, 101 U.S. 99 (1879), which held that a blank accounting ledger book was not subject to copyright protection. *Baker* quoted an earlier English decision which held that a cricket scoring sheet “was not a fit subject for copyright, partly because it was not new, but also because ‘to say that a particular mode of ruling a book constituted an object for a copyright is absurd.’” *Id.* at 106-07. Respondents submit that if lines in a book are not entitled to copyright protection, the same should be said for a single line on a map.

Even the simplest standard map can involve hundreds of decisions as to the manner in which the information is presented — through colors, form of printing, symbols, and decisions as to what to include and what to exclude. Such is not the case here. There is only one practical way to depict a proposed pipeline route on a pre-existing map — with a line. By Petitioner’s reasoning, a mapmaker could depict the location of a highway or political boundary, and prohibit all other mapmakers from depicting the same information. The shape of a knife or

simple recipes could also be copyrighted. The input of time and effort Kern River may have expended in selecting its pipeline route is irrelevant. *Rockford Map Publishers*, 768 F.2d at 148.

Kern River contends that the Fifth Circuit somehow violated the clearly erroneous standard of Fed. R. Civ. P. 52(a) by not respecting the "fact" findings of the district court. This argument is misplaced for several reasons.

Kern River begins by complaining of one sentence in the Fifth Circuit's opinion which said that extending copyright protection to the quad maps would grant Kern River a monopoly over the only approved pipeline route. This sentence, complains Kern River, is in turn based on the conclusion of an administrative law judge in a FERC proceeding that the market would only support one pipeline. Petition at 19. The reference to the ALJ's finding in the Fifth Circuit opinion was in that part of the opinion addressing the 1:250,000 scale maps. Kern River abandons in its Petition any claim that these maps are copyrightable. Petition at 7. Furthermore, Kern River has repeatedly admitted that the market would in fact only support one pipeline. Its complaint judicially admitted that "economic reality dictates that, in all likelihood, only one pipeline will be built of the kind described by the Kern River project." R. 955. It maintained in its brief to the Fifth Circuit that "only one pipeline is likely to be built on the Kern River Route." Appellant's Fifth Circuit Brief at 12, 24. Respondents submit that whether a line on a map is subject to copyright protection is either a pure question of law, or a mixed question of law and fact where the facts are not in dispute. Rule 52(a) does not apply to questions of law. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). The district court's analysis of the merger question is presented in its conclusions of law, and not in its findings of fact. The Fifth Circuit correctly noted that "[c]ourts have often found it difficult to draw the line between an idea and its expression. . . . 'The

guiding consideration in drawing the line [between an idea and its expression] is the preservation of the balance between competition and protection reflected in the patent and copyright laws.' " App. 10a (citation omitted). Surely such an analysis requires a court to render conclusions of law which are outside the ambit of Rule 52(a).

In addition, Kern River argued at the injunction hearing that questions relating to the merger of idea and expression were not questions of fact, but called for legal conclusions instead. When one of Kern River's witnesses was asked whether, "the idea of the route location that you want to communicate to FERC is exactly the same as the pipeline route in the map you filed with them," Kern River's counsel objected that "I think the question goes to the ultimate question and calls for a legal conclusion . . ." Tr. 416, 418. When the same witness was asked whether "the idea of the location of your pipeline route that you submitted to FERC and wanted them to approve is identical to the line that you furnished them so that they could review that line," counsel for Kern River again objected on grounds that "it's not established that a depiction is an idea or that a pipeline route is even an idea and to characterize it as the idea of the pipeline route simply calls for a legal conclusion on the ultimate question." Tr. at 419-20.

Kern River attempts to draw a meaningless distinction between the larger-scale maps and the smaller-scale maps. Both sets of maps set out the centerline for a mile-wide environmental corridor for which FERC approval was sought. The quad maps simply reflect Kern River's proposed pipeline route, which is also by design the centerline of the environmental corridor for which FERC approval was obtained. Respondents offered un rebutted evidence at the injunction hearing that their only goal was to be within the corridor, and that they had no plans to follow Kern River's exact route. *E.g.*, Tr. 331. Furthermore, the Kern River route does not and cannot possibly depict the exact location of a

thirty-six inch wide pipeline. *See* Petition at 8. Kern River itself brought out in its cross-examination at the injunction hearing that the width of the line itself on the maps, if blown up to life-size scale, would measure some 100 feet. Tr. 553. The Fifth Circuit correctly concluded that, regardless of a map's scale, a mere line on it depicting a proposed pipeline route is subject to the merger doctrine.

B. There is No Clear Conflict in the Circuits on a Presumption of Irreparable Harm; This Issue Was Not Even Reached by the Lower Courts; and Any Such Presumption Was Rebutted in the Pending Cause

In asking this Court to grant certiorari on the issue of whether or not there is a presumption of irreparable harm in copyright infringement actions, Kern River suggests a "direct and acknowledged" conflict in the circuits where none exists, on an issue that was not even reached by the lower courts, and that in any event would not affect the outcome of the pending cause.

It is clear that neither the district court nor the Fifth Circuit addressed the issue that Kern River now asks the Supreme Court to entertain. At the district court level, Judge Hoyt did not need to reach the issue, because he concluded that Kern River had not suffered *any* injury as a result of the alleged copying, much less *irreparable* injury. Judge Hoyt concluded that no evidence was presented that copying of the quad maps was necessary to the FERC approval process, and that "[a]t this point, the evidence does not establish the damages. . . . The Court is of the opinion that, while Kern River may have suffered damages and may prevail *at the time of trial* on the merits, those damages will exist only if Kern River is required to alter its route . . . and if Kern River is issued a certificate of public necessity and convenience with which construction may commence." App. 20a-21a (emphasis added). Likewise, the Fifth Circuit reached only the element of likelihood of success on the merits, and expressly

pretermitted the other elements for obtaining an injunction, including irreparable harm. App. 12a-13a.

For this reason alone, the Court should be reluctant to grant certiorari on this issue. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed. . . ."); *Patrick v. Bruget*, 486 U.S. 94, 98 n.5 (1988) ("This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court."); C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4036 (1988) ("Even if an issue has been properly presented, the Supreme Court is ordinarily reluctant to decide issues that have been passed over by the lower courts.").

Kern River suggests that this Court needs to resolve a conflict in the circuits on this issue. Respondents question whether such a conflict exists. The Fifth Circuit has not squarely reached the issue of whether a presumption of irreparable harm arises in preliminary injunction actions brought for copyright infringement. In *Plains Cotton Co-Operative Association v. Goodpasture Computer Service, Inc.* 807 F.2d 1256 (5th Cir. 1987), the Fifth Circuit simply held that such a rule "is not established in this Circuit," *id.* at 1261, and went on to conclude that the appellant's alleged damages appeared to be quantifiable and compensable in money damages. *Plains Cotton* quoted the Fifth Circuit's prior opinion in *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 390 (5th Cir. 1984), confirming that "[t]his Circuit has not expressed a view on whether a presumption of whether irreparable injury (the second prong) as a matter of law is appropriate after a substantial likelihood of success on the merits is shown."

Respondents also cannot agree with Kern River's contention that a presumption of irreparable harm is critical to the present

case, Petition at 23, for two reasons. First, since the merger doctrine applies and the maps in issue are not subject to copyright protection, Kern River did not make a prima facie case of infringement, and no presumption of irreparable harm should therefore apply even under the cases Kern River cites.

Second, and more important, none of the cases cited by Kern River even remotely suggests that a presumption of irreparable harm cannot be rebutted. In the pending case, Respondents overwhelmingly rebutted any presumption that could have arisen.

The evidence presented to the district court established that the one alleged incident of copying on April 4, 1988 in no way influenced the FERC to issue Wy-Cal its certificate. Tr. 334, 581. The evidence showed that there was no access to or use of any maps which depicted the Kern River route prior to April of 1988, and hence that Wy-Cal could not have used any Kern River maps in connection with its actual application filed with the FERC or in its response to the FERC's one data request, which was served in February of 1988. Tr. 321-22; Tr. 18, 20, 24, 27, 70 (May 26, 1989). Hence, Judge Hoyt was perfectly logical in concluding that "[n]o evidence was presented that Wy-Cal's copying of the Kern River's quad maps were necessary to the FERC approval process . . . at this point, the evidence does not establish the damages." App. 20a. In addition, evidence was presented, and Kern River in fact admitted in its own pleadings, that Wy-Cal could have orally adopted the Kern River route without physically copying any of the maps. Tr. 641-42; Record Tab 75 at 17. Furthermore, there was no evidence presented that the alleged copying in any way hindered the FERC's deliberations on the Kern River application. Hence, Judge Hoyt was on firm ground in concluding that "while Kern River may have suffered damages and may prevail at the time of trial on the merits, those damages will exist only if . . . Kern River is issued a certificate of

public necessity and convenience with which construction may commence." App. 21a.

One of Kern River's own witnesses also confirmed that its records would permit it to quantify the alleged damages which had occurred, and another Kern River witness confirmed that if Wy-Cal had paid Kern River, in September of 1987, for a reasonable share of Kern River's claimed expenses, Wy-Cal could have used the information contained in the Kern River maps without objection. R. 472-73; Def. Exh. 165 at 72-73. The federal courts are in uniform agreement that an alleged injury is not irreparable if it can be compensated through monetary damages.⁴

Respondents submit that this case stands in contrast to those cases cited by Petitioner where there is a realistic and practical concern that a defendant will continue to copy and sell a copyrighted work, resulting in future lost profits which may be difficult or impossible to measure. In this case, any injury to Petitioner as a result of an alleged single act of copying which occurred in 1988 is compensable in money damages. Even the cases cited by Petitioner do not go so far as to suggest that a presumption of irreparable injury is always appropriate in a copyright infringement action.⁵

⁴ E.g., *Deerfield Medical Center v. Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *Irre Feit & Drexler, Inc.* 760 F.2d 406, 416 (2d Cir. 1985); *Holley Sugar Corp. v. Goshen Sugar Corp. Cooperative Beet Growers Association*, 725 F.2d 564, 570 (10th Cir. 1984).

⁵ For example, the first three cases cited by Petitioner do not state such a hard and fast rule. See *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 611-12 (1st Cir. 1988) ("Irreparable harm is *usually* presumed if likelihood of success on the copyright claim has been shown.") (emphasis added); *Rushton v. Vitale*, 218 F.2d, 434, 436 (2d Cir. 1955) ("When a *prima facie* case for copyright infringement has been made, plaintiffs are entitled to a preliminary injunction without a *detailed* showing of danger of irreparable harm.") (emphasis added); *Uneeda Doll Co. v. Goldfarb*

Respondents do not believe that this Court's opinion in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), requires a presumption of irreparable injury in cases where copying is for commercial gain, for several reasons. There the Court stated that a likelihood of future harm "may" be presumed where the intended use of the copying is for commercial gain. *Id.* at 451. The Court clearly used the word "may" rather than "must" or "should." Second, Kern River quotes from that section of the opinion which analyzed the fair use defense. The Supreme Court was not addressing whether irreparable injury should be presumed when a party seeks a preliminary injunction. Instead, the Court was addressing whether a likelihood of future harm may be presumed under a fair use analysis. Third, the language quoted is clearly dicta, in that the *Sony* case dealt with home use of video tape recorders, which "must be characterized as non-commercial, non-profit activity." *Id.* at 448.

Finally, Respondents would note that the Copyright Act does not mandate a presumption of irreparable harm. The provision cited by Petitioner, 17 U.S.C. § 502(a), provides only that courts of competent jurisdiction may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

Novelty Co., 373 F.2d 851, 852 (2d Cir.) (same), *cert. dismissed*, 381 U.S. 801 (1967).

C. The Court of Appeals Did Not Even Reach, Much Less Violate, This Court's Interpretations of the "Fair Use" Defense Under Section 107 of the Copyright Act

Kern River complains that the Court of Appeals ignored the issue of fair use which it had raised in its appeal from the denial of the injunction. The Fifth Circuit did not reach the issue of fair use because it correctly concluded that the quad maps in question were not copyrightable by virtue of the doctrine of merger, and that hence there was no need to reach this issue. App. 12a.⁶ As with the issue of irreparable harm, therefore, the Court should be reluctant to grant certiorari on this issue.

Regardless, Respondents established in the district court that they were entitled to invoke the fair use defense. Four non-exclusive factors to consider in making a fair use determination are provided in 17 U.S.C. § 107: (1) the purpose and character of the use, including whether such use is of a commercial nature or for non-profit or educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

⁶ Kern River asserts in its Petition that the fair use issue was the "single substantive issue" presented to the Fifth Circuit on appeal. Petition at 28. On the contrary, numerous other substantive issues were presented, including jurisdiction, ownership of the copyrights, invalidity of the copyrights due to prior publication and failure to cure, and lack of causation. Respondents properly raised these issues in the Fifth Circuit as independent grounds for concluding that the district court was correct in denying the injunctive relief requested. See, e.g., *Colautti v. Franklin*, 439 U.S. 379, 397, n.16 (1979) ("Appellees, as the prevailing parties may of course assert any ground in support of that judgment, 'whether or not that ground was relied upon or even considered by the trial court'"); *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 n.3 (5th Cir. 1986) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those given or relied on below."), *cert. denied*, 479 U.S. 1064 (1987).

The district court made factual findings on each of these factors, and, in considering the "totality of the circumstances," concluded that the fair-use doctrine was applicable in this case. As to the first factor, the court was obviously aware that Respondent Wy-Cal was in commercial competition with Kern River and that any alleged copying was for commercial purposes. It was obviously aware that the maps were created for informational purposes as opposed to creative or artistic purposes, and noted the extent to which the maps had been distributed and hence that they were not of an unpublished nature. It also made fact findings as to which of Kern River's numerous copyrighted maps had been copied. As to the economic impact of the alleged copying, the court found that no damages had occurred, since the use of Kern River's quad maps were unnecessary to the FERC approval process. App. 16a-21a.

The Court did not err in looking to the "totality of the circumstances" in making a fair-use determination. "The doctrine is an 'equitable rule of reason,' which 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Stuart v. Abend*, 110 S.Ct. 1750, 1768 (1990) (citations omitted). "Beyond a broad statutory explanation of what fair use is and some criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis." *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 448 (1984) (quoting H.R. Rep. No. 94-1476). Hence, this Court has noted that "fair-use analysis must always be tailored to the individual case." *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 552 (1985).

The defendant's state of mind is relevant to the question of fair use. *E.g.*, *Key Maps, Inc. v. Pruitt*, 470 F. Supp. 33 (S.D. Tex. 1978); *New York Tribune, Inc. v. Otis & Co.*, 39 F. Supp. 67, 68 (S.D.N.Y. 1941). In this case, the district court found that

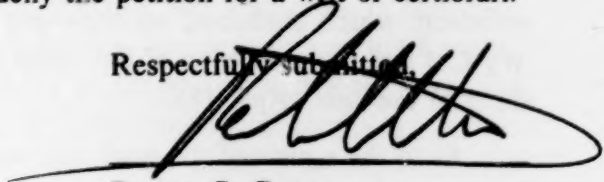
the alleged copying was totally innocent, in that Wy-Cal's draftsmen were unaware of any claim of copyright as to the maps they reviewed, which contained no copyright notice, and that indeed Wy-Cal had no knowledge of the claim of copyright prior to the filing of the suit. App. 18a.

As to the nature of the work, the scope of fair use is greater where, as here, informational works as opposed to artistic or creative works are involved. *Harper & Row Publishers, supra* at 563. Likewise, the unpublished nature of a work is deemed to be a critical element of its "nature," and a fair use defense is viewed less favorably when the work is unpublished. *Id.* at 564. Respondents put on evidence that the maps in question were published on many occasions to virtually anyone who requested a copy. Tr. 206-36. Based on all of these circumstances, the district court was within its discretion in determining that a single, innocent act of copying a single line on maps which were not even registered with the Copyright Office until months later, and which bore no indication of proprietary rights, fell within the fair use doctrine.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to Robin C. Gibbs, is written over the "Respectfully submitted," text.

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OCT 13 1990

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(5)
No. 90-443

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

J. TIMOTHY HOBBS
MASON, FENWICK & LAWRENCE
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TABLE OF CONTENTS

	Page
I. RESPONDENTS DISTRACT THE COURT WITH ISSUES RESOLVED AGAINST THEM IN THE PROCEEDINGS BELOW.	1
II. RESPONDENTS MISSTATE THE RECORD	2
A. Respondents Copied Petitioner's Maps.	2
B. Respondents' Draftsmen Knew Exactly Where The Copied Maps Came From.	2
C. Respondents Were Well Aware Of Petitioner's Claim Of Property Rights In The Disputed Maps.	3
D. Respondents Misstate Their Purpose In Copying Kern River's Maps And The Advantages They Achieved From Such Copying.	4
E. The District Court Found That There Was A Meaningful Distinction Between Kern River's 1:250,000 Scale Maps And Its 1:24,000 Maps.	6

	Page
III. ARGUMENT	6
A. LINES ON A MAP DEPICTING A PROPOSED PIPELINE ARE SUBJECT TO COPYRIGHT PROTECTION IF THEY EXHIBIT A REQUISITE DEGREE OF ORIGINALITY.	6
B. RESPONDENTS' OTHER ARGUMENTS FAIL TO NEGATE THE IMPORTANCE OF THIS CASE TO THE CARTOGRAPHIC INDUSTRY.	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
<i>Blunt v. Patten</i> F. Cas. No. 1580 (C.C.N.Y. 1828)	8
<i>Burrow-Giles Lithographic Co. v. Sarony</i> 111 U.S. 53 (1884)	9
<i>County of Ventura v. Blackburn</i> 362 F.2d 515 (9th Cir. 1966)	8
<i>Crocker v. General Drafting Co.</i> 50 F.Supp. 634 (S.D.N.Y. 1943)	8
<i>Del Madera Properties v. Rhode and Gardner, Inc.</i> 820 F.2d 973 (9th Cir. 1987)	8
<i>Emerson v. Davies</i> 8 F. Cas. 615 (No. 4436) (C.C.D.Mass. 1845)	8, 9
<i>Farmer v. Calvert Lithographing Co.</i> 8 F. Cas. 1022 (No. 4651) (C.C.E.D. Mich. 1872)	8
<i>General Drafting Co. v. Andrews</i> 37 F.2d 54 (2d Cir. 1930)	8, 9
<i>Goldstein v. California</i> 412 U.S. 546 (1973)	7
<i>Gray v. Russell</i> 10 F. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839)	8

CASES	Page
<i>International News Service v. Associated Press</i> 248 U.S. 215 (1918)	7
<i>Intown Enterprises, Inc. v. Barnes</i> 721 F.Supp. 1263, 1266 (N.D.Ga. 1989)	4
<i>Mojave Pipeline Co.</i> 42 FERC (CCH) ¶ 61,351 (1988)	5
<i>Mojave Pipeline Co.</i> 44 FERC (CCH) ¶ 61,210 (1988)	5
<i>Newton v. Voris</i> 364 F.Supp. 562 (D.Ore. 1973)	8
<i>Rockford Map Publishers, Inc. v. Directory Service Co.</i> 768 F.2d 145 (7th Cir.), cert. denied, 474 U.S. 1061 (1986)	8
<i>United States v. Hamilton</i> 583 F.2d 448 (9th Cir. 1978)	8
<i>Woodman v. Lydiard-Peterson Co.</i> 192 F. 67 (C.C.D.Minn. 1912), aff'd, 204 F. 921 (8th Cir. 1913), reh. den. 205 F. 900 (1913)	7, 8
<i>Wyoming-California Pipeline Co.</i> FERC Docket Nos. CP87-479-000 and CP87-480-000	4

STATUTES

17 U.S.C. § 107	10
-----------------	----

UNITED STATES CONSTITUTION

Art. I, § 8, Cl. 8	6
------------------------------	---

MISCELLANEOUS

Gorman, <i>Copyright Protection for the Collection and Representation of Facts</i> 76 Harv. L. Rev. 1569 (1963)	8
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I. RESPONDENTS DISTRACT THE COURT WITH ISSUES RESOLVED AGAINST THEM IN THE PROCEEDINGS BELOW.

Respondents' Brief is replete with distracting references to issues that were resolved adversely to Wy-Cal¹ by the District Court. *E.g.*, Response Brief ("Res. Br.") at 6-7. While Respondents may "continue to believe" that they are entitled to prevail on each of these grounds, the District Court correctly held that:

- (1) The District Court's jurisdiction to award relief for copyright infringement² could not be abrogated by the FERC for the mere sake of administrative convenience.
- (2) Petitioner, as a partnership, is the proper owner of the copyrights in works contributed by its constituent partners.
- (3) Petitioner's maps are not precluded from copyright protection merely because they are based in part on earlier works.
- (4) Petitioner's limited distribution of maps to landowners and other interested parties on a need-to-know basis, without formal copyright notice, was a "limited publication" for which no "cure" was required.

¹ Wyoming-California Pipeline Company ("Wy-Cal") was the principal representative of Respondents in the events involved in this controversy.

² Respondents state that "Kern River sought to impound the certificate issued to Wy-Cal by the FERC..." Respondents' Brief at 6. In reality, the primary relief sought by Kern River was the impoundment of the infringing maps and an injunction against Wy-Cal's use of those maps. *See* Kern River's Post-Hearing Brief dated June 15, 1989 at 5.

II. RESPONDENTS MISSTATE THE RECORD

A. Respondents Copied Petitioner's Maps.

The District Court correctly found that Respondents copied Petitioner's copyrighted maps. Respondents attempt to obscure this fact, stating euphemistically that "Wy-Cal's draftsmen plotted on blank pages the center-line of the corridor as reflected by the maps provided by the Chambers Group." Res. Br. at 3. Translated, this means: they copied the maps. Respondents then state elliptically that "Wy-Cal used maps which were generated without referring to any maps later registered by Kern River." *Id.* at 4. Respondents fail to add that they subsequently copied Petitioner's copyrighted maps and, by their own admission, "distributed" these maps "to the FERC, the CSLC, Chambers and other interested persons,"³ all in support of their application to construct a pipeline in competition with Petitioner's application.

B. Respondents' Draftsmen Knew Exactly Where The Copied Maps Came From.

Respondents would portray Wy-Cal as an "innocent" victim led down a primrose path by the contractor who provided Wy-Cal with access to Kern River's maps. However, Respondents falsely represent that "The Chambers Group arranged with Wy-Cal for Wy-Cal representatives to visit The Chambers Group office in Albuquerque in order to plot accurately the centerline of the FEIS [Final Environmental Impact Statement] corridor." Res. Br. at 2-3. In reality it was Wy-Cal, not The Chambers Group, that initiated this meeting and that was responsible for the necessary "arrangements."⁴ Moreover, Respondents did not merely copy the center line of the approved corridor; in addition, they copied *all* of Petitioner's approximately 140 maps representing the entire length of Petitioner's route,

³ Record (hereinafter "R.") Vol. 4, Docket No. 57, at 7.

⁴ Testimony of Floyd Robertson, R. Vol. 11, Tr. at 329-330.

including portions of Petitioner's route *outside* the common stretches of the parties respective routes at that time.⁵

Respondents further state that "[t]he Wy-Cal draftsmen were unaware of where the maps came from..." Res. Br. at 3. However, Wy-Cal's draftsmen knew exactly where the maps came from, for the maps bore a stamp identifying them as Kern River's work product.⁶

C. Respondents Were Well Aware Of Petitioner's Claim Of Property Rights In The Disputed Maps.

Respondents state that "Wy-Cal never had knowledge of a claimed copyright on the maps prior to the filing of this suit," Res. Br. at 3, and that Kern River "never advised anyone of its alleged copyrights until after the FERC indicated it was granting a certificate to Wy-Cal three or four years later." *Id.* at 4. In reality, Wy-Cal was keenly aware of Kern River's proprietary interest in the subject maps prior to copying them. In prior proceedings before the FERC, Kern River had consistently sought to enforce its rights by seeking administrative remedies to prevent

⁵ Testimony of Jeffrey Kinnan, R. Vol. 15, Tr. at 45-46.

⁶ One of Respondents' draftsman who copied Petitioner's maps testified in his deposition:

Q. [D]o you recall [the maps] having a Kern River stamp on them, a revision stamp on some of the quad maps, the copies that you looked at?

A. Yes, I do.

Q. Did you believe those maps to be Kern River's maps at the time you were looking at them?

A. Yes.

Testimony of Larry Gene Dickinson, admitted as attachment to Plaintiff's Summary of Deposition Transcripts at p. 8, entered May 4, 1989, R. Vol. 3, Docket No. 80.

Wy-Cal from misappropriating the fruits of Kern River's labor in Wy-Cal's FERC application.⁷ In any event, no notice of copyright was required, because there was no general publication of Petitioner's maps. See *Intown Enterprises, Inc. v. Barnes*, 721 F.Supp. 1263, 1266 (N.D.Ga. 1989) ("innocent infringer" defense unavailable for unpublished works despite absence of notice).

D. Respondents Misstate Their Purpose In Copying Kern River's Maps And The Advantages They Achieved From Such Copying.

Respondents mislead the Court in stating that "Wy-Cal wished to be within the corridor, but was not interested in tracking precisely the Kern River route." Res. Br. at 3. In reality, Respondents' route ultimately *did* "track precisely" Kern River's route.

Respondents further distort the record by suggesting that they achieved no significant benefit from their copying of Kern River's maps and that their use of the copied maps was merely superfluous to the administrative process. Wy-Cal's submission of infringing maps was the outgrowth of a data request *from the FERC*. Moreover, Respondents' copying provided them with a windfall *independently* of the administrative process: it allowed them to avoid the expenditure of time, effort and money necessary to derive their own detailed route within the EIS corridor, which was needed in order to proceed with right-of-way activities and other construction-related efforts.⁸

⁷ E.g., *Wyoming-California Pipeline Co.*, FERC Docket Nos. CP87-479-000 and CP87-480-000, Motion of Kern River Gas Transmission Co. to Intervene, Protest, Motion to Consolidate, Motion to Dismiss and Contingent Motion to Defer Consideration (September 10, 1987), at pp.7-11.

⁸ Testimony of Robert Sluder, R. Vol. 8, Tr. at 47; Testimony of Cuba Wadlington, R. Vol. 12, Tr. at 391, 396-97; Testimony of Floyd Robertson, R. Vol. 14, Tr. at 628, 650.

Respondents are also incorrect in stating that "[t]here was no evidence presented that Wy-Cal's application with the FERC in any way delayed or hindered a ruling on Kern River's application..." Res. Br. at 5. In fact, Kern River's application was delayed because of Wy-Cal's application. In March and August 1988, the FERC issued orders requiring the administrative law judge to delay an initial decision on Kern River's application in favor of proceeding rapidly with consideration of the environmental aspects of Wy-Cal's application.⁹ If Wy-Cal had failed to demonstrate that its proposed route lay within the EIS corridor, the Commission would not have been in a position to expedite the review of Wy-Cal's application at the expense of Petitioner's application.

Respondents conclude that "the copies of the maps resulting from the April 4, 1988 Albuquerque incident [*i.e.*, the copied maps] were not required for Wy-Cal to obtain a FERC certificate." Res. Br. at 4. Petitioner agrees that Respondents could have created their own maps based on the information otherwise available to them. However, this fact contradicts the finding of the Court of Appeals that "[t]o extend copyright protection to the quad maps would grant Kern River a monopoly over the only approved pipeline route." 899 F.2d at 1465; App. 12a.¹⁰ If copying Petitioner's maps was not necessary to Respondents, then extending copyright protection to Petitioner's maps could hardly grant a monopoly to Kern River over the proposed route.

⁹ *Mojave Pipeline Co.*, 42 FERC (CCH) ¶ 61,351 (1988); *Mojave Pipeline Co.*, 44 FERC (CCH) ¶ 61,210 (1988).

¹⁰ Respondents imply that the Court of Appeals' reference to a monopoly was limited to "one sentence." Res. Br. at 12. In fact, the Court of Appeals cited the perceived threat of a "monopoly" in four separate portions of its opinion, *see* 899 F.2d at 1464, 1465, making it clear that this constituted the principal basis for its decision.

E. The District Court Found That There Was A Meaningful Distinction Between Kern River's 1:250,000 Scale Maps And Its 1:24,000 Maps.

Finally, Respondents misstate the record by claiming that Kern River has invented a spurious distinction between its 1:250,000 maps and its 1:24,000 maps (the "quad" maps), thus "abandoning" its copyright claim in the former. *See* Res. Br. at 3. In fact, it was the District Court, not Petitioner, that found this distinction to be crucial. App. 19a - 20a.

Respondents attempt to obscure this distinction, stating: "Nor could the proposed Kern River route as depicted on its quad maps possibly depict the *exact* location of a 36-inch pipeline which might ultimately be built as Kern River argues."¹¹ However, the fact remains that any number of proposed routes could be located *within* the mile-wide corridor, regardless of whether they were 36 inches wide or 100 feet wide.

III. ARGUMENT

A. Lines On A Map Depicting A Proposed Pipeline Are Subject To Copyright Protection If They Exhibit A Requisite Degree of Originality.

The Copyright Clause of the U.S. Constitution grants Congress the power to protect the "Writings" of "Authors."¹² The definition of "writings" is intended to be read expansively.

¹¹ Respondents state, "The very width of the line would measure some 100 feet on the ground, given the scale of the maps on which they were drawn." Res. Br. at 3-4. However, 100 feet is approximately the width of the right-of-way needed to construct the pipeline, and the work space needed to install and maintain the pipe is an essential element of the pipeline route. Therefore, a line representing 100 feet on the ground is an accurate description of where the pipeline will be installed.

¹² U.S. Const., Art. I, § 8, Cl. 8.

International News Service v. Associated Press, 248 U.S. 215, 234 (1918).¹³

Respondents argue that "a mere line depicting a proposed pipeline route on preexisting USGS maps in the public domain cannot be copyrighted." Res. Br. at 8. However, in one of the seminal cartography cases it was held that the mapmaker's contribution of a mere line representing part of a road was subject to copyright protection; the court there concluded that:

The defendant itself had a right to take from the same sources that the complainant sought. It had a right itself to make a map which would be identical with the complainant's map and not infringe the copyright, but it did not see fit to do that. Instead of expending its own time and labor for that purpose and making a map which would be identical with complainant's map, and thus protecting itself, it made an exact copy of the complainant's map, and thereby saved itself the expenditure of time and labor which the complainant was compelled to expend himself in order to make his map.

Woodman v. Lydiard-Peterson Co., 192 F. at 70.

Respondents claim that "Kern River's proposed pipeline route is a paradigm example of the merger of idea and expression" because a line "is the only way of expressing the ideas" embodied in the route. Res. Br. at 10.¹⁴ On the

¹³ These terms have been construed not in their "narrow literal sense, but, rather, with the reach necessary to reflect the broad scope of constitutional principles." *Goldstein v. California*, 412 U.S. 546, 561 (1973). The word "writings...may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor." *Id.* (emphasis added).

¹⁴ Again Respondents distort the record, for methods of expressing a pipeline route *other* than as a line on a map are frequently used in the industry, e.g. alignment sheets and photogrammetric surveys. Testimony

contrary, no court has ever held an original work of cartography to be precluded from copyright protection on such basis, although there are numerous cases holding similar maps subject to protection.¹⁵

The fallacy of Respondents' argument is apparent in their assertion that copyright protection for cartographic works should extend only to "colors, form of printing, [and] symbols..." and not to the depicted location of a "highway or political boundary." Res. Br. at 11. This view, and the Court of Appeals' holding supporting it, signifies a radical departure from the existing scope of protection for maps and other "fact works."¹⁶ It would apply to preclude copyright protection for a line depicting a river, a road, or any other geographical feature. If an independent cartographer created a map of Petitioner's proposed pipeline based on his own observations and surveys, his work would similarly be denied copyright protection. This astonishing proposition accounts for the concerns registered in this case by representatives

of Robert Sluder, R. Vol. 8, Tr. at 49 and R. Vol. 15, Tr. at 153; Testimony of Floyd Robertson, R. Vol. 14, Tr. at 636.

¹⁵ E.g., *Blunt v. Patten*, F. Cas. No. 1580 (C.C.N.Y. 1828); *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839); *Emerson v. Davies* 8 F. Cas. 615 (No. 4436)(C.C.D.Mass. 1845); *Farmer v. Calvert Lithographing Co.*, 8 F. Cas. 1022 (No. 4651)(C.C.E.D. Mich. 1872); *Woodman v. Lydiard-Peterson Co.*, 192 F. 67 (C.C.D.Minn. 1912), *aff'd*, 204 F. 921 (8th Cir. 1913), *reh. den.* 205 F. 900 (1913); *General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930); *Crocker v. General Drafting Co.*, 50 F.Supp. 634 (S.D.N.Y. 1943); *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966); *Newton v. Voris*, 364 F.Supp. 562 (D.Ore. 1973); *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *Rockford Map Publishers, Inc. v. Directory Service Co.*, 768 F.2d 145 (7th Cir.), *cert. denied*, 474 U.S. 1061 (1986); *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987).

¹⁶ See generally Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 Harv. L. Rev. 1569 (1963).

of the cartography industry who have moved the Court to appear as *amicus curiae*.

The issue is not whether the line on a map is the only way of expressing a geographical location, for a third party is free to create an identical map as long as he does not *copy* that of the plaintiff. Nor is the issue whether the line is drawn on a preexisting USGS map.¹⁷ The issue is whether the line represents an *original contribution*. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-61 (1884). The Court of Appeals below held that Petitioner's maps "clearly...met the originality requirement." 899 F.2d at 1464, App. 11a. The inquiry should have ended there.

In summary, no one owns the location of a proposed route depicted on a map, and third parties are free to create identical maps of the route through their independent efforts. However, third parties are not free to copy and commercially exploit the original cartographic works of another; such copying, in the words of Justice Story, is nothing but "downright piracy." *Emerson v. Davies*, 8 Fed. Cas. 615, 619 (No. 4436) (C.C.D. Mass. 1845).

B. Respondents' Other Arguments Fail to Negate The Importance Of This Case To The Cartographic Industry.

Respondents' remaining arguments relate to the Fifth Circuit's refusal to join the other Circuits in recognizing a presumption of harm in determining the availability of preliminary relief,¹⁸ and its refusal to consider whether Respondents' copying

¹⁷ In fact, contributions of cartographers to preexisting USGS maps have been specifically held subject to copyright protection. *See General Drafting Co. v. Andrews*, 37 F.2d 54, 55 (2d Cir. 1930).

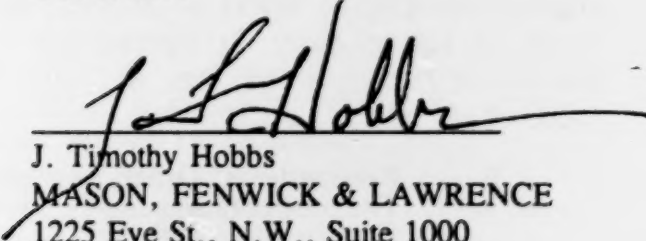
¹⁸ Respondents argue that the evidence in this case "rebutted" a presumption of irreparable harm. Again, Respondents misstate the record in claiming that Kern River suffered no damages whatsoever; the District

constituted "fair use" under 17 U.S.C. § 107. Respondents urge this Court to abstain from reviewing these issues because the Court of Appeals itself refused to do so, hardly a convincing proposition given the severity of the error committed by the Court of Appeals in its quest to avoid the issues presented to it. While those issues warrant review by this Court in their own right, the superseding reality of this case is that a Writ of Certiorari is vitally necessary to address the issue which the Court of Appeals *did* decide.

CONCLUSION

For all the reasons discussed above, Respondents' Brief is lacking in merit, and this Court should grant the requested Writ of Certiorari.

Respectfully submitted,
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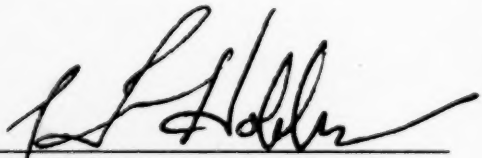
Court found that "Kern River may have suffered damages and may prevail at the time of trial on the merits." App. 21a.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 18, 1990, copies of the foregoing REPLY BRIEF IN OPPOSITION were sent by first class mail, postage prepaid, to the following counsel of record:

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October 18, 1990

3
No. 90-443

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE ON BEHALF OF WIDE
WORLD OF MAPS, INC. IN SUPPORT OF PETITIONER

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COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN PIPELINE COMPANY,
and WYOMING-CALIFORNIA PIPELINE COMPANY
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Wide World of Maps, Inc., an Arizona corporation (hereinafter "Amicus") having a direct interest in the outcome of the captioned case, respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to Amicus' filing of this brief. The consent of respondent, The Coastal Corporation, et al., was requested but refused.

STATEMENT OF INTEREST

Wide World of Maps, Inc. (hereinafter "Amicus") is an Arizona corporation engaged in the cartographic industry. Amicus is the largest map retailer in the United States. Amicus spends hundreds of thousands of dollars every year on cartography and other costs associated with the development and publication of its maps for sale.

For the reasons stated below, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers. Amicus accordingly urges the Court to grant the Petition for Certiorari filed by Kern River Gas Transmission Co. (hereinafter "Kern River") and to reverse the decision of the Court of Appeals below.

REASONS FOR GRANTING THE MOTION

As grounds for this Motion, Amicus would show the Court that it is actively engaged in the cartographic business and is the largest map retailer in the United States. Amicus spends hundreds of thousands of dollars every year on cartography and other costs associated with the development and publication of its maps for sale. For the reasons stated in Amicus' brief filed herewith, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers.

CONCLUSION

WHEREFORE, Amicus moves the Court for leave to appear in support of the Petition for Certiorari herein and to file brief attached hereto.

Respectfully submitted,
WIDE WORLD OF MAPS, INC.

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October 15, 1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 1990, copies of the foregoing AMICUS BRIEF OF WIDE WORLD OF MAPS, INC. IN SUPPORT OF PETITION FOR CERTIORARI were sent by first class mail, postage prepaid, to the following counsel of record:

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October 15, 1990

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
INTEREST OF WIDE WORLD OF MAPS, INC. AS AMICUS CURIAE	1
ARGUMENT	2
THE FIFTH CIRCUIT'S DECISION BELOW DEPARTS RADICALLY FROM THE LAW OF OTHER CIRCUITS AND POSES AN IMMEDIATE THREAT TO ALL MAPMAKERS BY NEGATING COPYRIGHT PROTECTION FOR MAPS GENERALLY.	2
I. The Fifth Circuit's Opinion Departs Radically From The Law Of Other Circuits In Respect To Copyright Protection For Maps.	2
II. The Principle Announced By The Fifth Circuit Poses An Immediate Threat To All Mapmakers By Negating Protection For Maps Generally. 7	
III. The Issue Raised By This Case Warrants A Writ Of Certiorari.	8
CONCLUSION	10
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

CASES:	Page
<i>Amsterdam v. Triangle Publications, Inc.</i> , 189 F.2d 104 (3d Cir. 1951)	4
<i>Baker v. Selden</i> , 101 U.S. 99 (1879)	6
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979)	9
<i>C.S. Hammond & Co. v. International College Globe, Inc.</i> , 210 F.Supp. 206 (S.D.N.Y. 1962)	5
<i>Community for Creative Non-Violence v. Reid</i> , ___ U.S. ___, 104 L.Ed.2d 811 (1989)	8
<i>Crocker v. General Drafting Co.</i> , 50 F.Supp. 634 (S.D.N.Y. 1943)	6
<i>County of Ventura v. Blackburn</i> , 362 F.2d 515 (9th Cir. 1966)	4
<i>Del Madera Properties v. Rhodes & Gardner, Inc.</i> , 820 F.2d 973 (9th Cir. 1987)	5
<i>DeSylva v. Ballentine</i> , 351 U.S. 570 (1956)	9
<i>Dowling v. United States</i> , 473 U.S. 207 (1985)	8

TABLE OF AUTHORITIES---Continued

<i>Cases:</i>	<i>Page</i>
<i>Emerson v. Davies</i> , 8 Fed. Cas. 615 (No. 4436 (C.C.D. Mass. 1845)	3, 8
<i>F.L. Woolworth Co. v. Contemporary Arts, Inc.</i> , 344 U.S. 228 (1952)	8
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968)	9
<i>Fred Fisher Music Co. v. M. Witmark & Sons</i> , 318 U.S. 643 (1943)	9
<i>General Drafting Co. v. Andrews</i> , 37 F.2d 54 (2d Cir. 1930)	4, 5
<i>Gray v. Russell</i> , 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839)	2, 3, 8
<i>Mazer v. Stein</i> , 347 U.S. 201 (1954)	9
<i>Mills Music, Inc. v. Snyder</i> , 469 U.S. 153 (1985)	9
<i>Newton v. Voris</i> , 364 F.Supp. 562 (D.Ore. 1973)	6
<i>Sawyer v. Crowell Publishing Co.</i> , 142 F.2d 497 (2d Cir. 1944)	5

TABLE OF AUTHORITIES---Continued

Cases:	Page
<i>Sheldon v. Metro-Goldwyn Pictures Corp.</i> , 309 U.S. 390 (1940)	9
<i>Stewart v. Abend</i> , ___ U.S. ___, 109 L.Ed.2d 184, 201 (1990)	8
<i>Teleprompter Corp. v. Columbia Broadcasting System</i> , 415 U.S. 394 (1974)	9
<i>Twentieth Century Music Corp. v. Aiken</i> , 422 U.S. 151 (1975)	8
<i>United States v. Hamilton</i> , 583 F.2d 448 (9th Cir. 1978)	4, 5
<i>Woodman v. Lydiard-Peterson Co.</i> , 192 F. 67 (C.C.D.Minn. 1912), <i>aff'd</i> , 204 F. 921 (8th Cir. 1913)	5

MISCELLANEOUS	Page
Gorman, <i>Fact or Fancy? The Implications for Copyright</i> , 29 J. Copyright Soc'y USA 560, 564 (1982)	7
Whicher, <i>Originality, Cartography, and Copyright</i> , 38 N.Y.U.L.Rev. 281 (1963)	3

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For the reasons stated below, Amicus believes that the decision of the Fifth Circuit in this case, if allowed to stand, would have a devastating impact on the copyright protection available for its maps, and for maps generally, and that the decision of the Fifth Circuit Court has a direct, damaging and unwarranted impact on all commercial map makers. Amicus accordingly urges the Court to grant the Petition for Certiorari filed by Kern River Gas Transmission Co. (hereinafter "Kern River") and to reverse the decision of the Court of Appeals below.

ARGUMENT

**THE FIFTH CIRCUIT'S DECISION BELOW
DEPARTS RADICALLY FROM THE LAW OF OTHER
CIRCUITS AND POSES AN IMMEDIATE THREAT TO
ALL MAPMAKERS BY NEGATING COPYRIGHT
PROTECTION FOR MAPS GENERALLY.**

I. THE FIFTH CIRCUIT'S OPINION DEPARTS RADICALLY FROM THE LAW OF OTHER CIRCUITS IN RESPECT TO COPYRIGHT PROTECTION FOR MAPS.

In permitting the Respondents herein to avail themselves of the time, expense and creative efforts undertaken by Petitioner's cartographers, the Fifth Circuit's opinion below flies in the face of Justice Story's pronouncements in *Gray v.*

Russell, 10 F. Cas. 1035 (No. 5728) (C.C.D. Mass. 1839),¹ and *Emerson v. Davies*, 8 Fed. Cas. 615 (No. 4436 (C.C.D. Mass. 1845)).² Moreover, the result reached by the Fifth Circuit is in basic conflict with the law of every other Circuit to consider the extent of copyright protection available for maps.

Although there has been a degree of controversy throughout the years over the extent of protection available for maps under the U.S. copyright law, the primary debate has always been over the degree of *originality* a map must exhibit to warrant such protection. See, e.g., Whicher, *Originality, Cartography, and Copyright*, 38 N.Y.U.L.Rev. 281 (1963).

¹ In *Gray v. Russell*, Justice Story of this Court stated:

[S]uppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys in order to perfect such a map... It is clear, that notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear, that *he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party...*

10 F. Cas. at 1037-38 (emphasis added). See Petitioner's Brief at 13-14.

² In *Emerson v. Davies*, Justice Story stated:

A man...has no right to publish a map taken substantially and designedly from the map of the other person, without any ... exercise of skill, or labor, or expense. If he copies substantially from the map of the other, it is *downright piracy*; although it is plain that both maps must, the more accurate they are, approach nearer in design and execution to each other.

8 F. Cas. at 619 (emphasis added). See Petitioner's Brief at 14.

The caselaw in this area falls generally into two groups: (1) decisions recognizing copyright protection for *any* map displaying a requisite degree of originality, even if the map was prepared exclusively through a compilation of cartographic sources already in existence,³ and (2) cases requiring *additionally* that the map be prepared on the basis of independent field observations by the cartographer.⁴

Under either of these viewpoints, original maps such as those of the Petitioner in this case, prepared on the basis of independent observations and field surveys, would be entitled to copyright protection. In fact, maps such as those of Petitioner have been consistently held entitled to copyright protection.

For example, in *County of Ventura v. Blackburn*, 362 F.2d 515 (9th Cir. 1966), the plaintiff took road and street data from government maps and other sources; identified owners and land parcels from the Ventura County assessor's records and corrected such errors on the map; took data on such features as rivers, canyons, creeks, and drainage channels from aerial photographs and United States topographical maps; and checked various legal descriptions of boundaries of cities against the county records. The court upheld the validity of the map copyright where the plaintiff mapmaker "spent time and effort to compile, collate, assemble, draft and prepare the information depicted" on the map. 362 F.2d at 517.

Similarly, in *General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930), the court held that the plaintiff's road maps

³ E.g., *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978).

⁴ E.g., *Amsterdam v. Triangle Publications, Inc.*, 189 F.2d 104 (3d Cir. 1951).

were copyrightable where the mapmaker, like Petitioner in the present case, began with topographical maps obtained from the United States Geological Survey (USGS). The facts in *General Drafting Co.* are remarkably similar to those of the present case. The plaintiff in *General Drafting Co.* started by securing USGS maps and then, like the Petitioner herein, obtained detailed information concerning the conditions through personal interviews with county engineers. The plaintiff then recorded such information upon the USGS maps, designating each road condition as "first class," "second class," or "third class," having regard solely to its availability for automobile travel. In many cases the plaintiff verified by direct observation the actual physical condition of the road, and then transferred this detailed information to a base map composed of a large number of individual USGS maps. At this stage, the process of selection was begun; a large tracing was made of the assembled section of maps, but only such information as the plaintiff mapmaker thought would be of use to motorists. The relative condition of each road was indicated on the tracing by a double, heavy line, or a thin, single line; the large tracing was photographically reduced to the desired size; and a smaller tracing was made, on which the information was finally audited and corrected before the map was hand drawn. The lower court in *General Drafting Co.* denied relief, but the court of appeals reversed, holding that the maps were "clearly the subject of copyright. 37 F.2d at 55, citing *Woodman v. Lydiard-Peterson Co.*, 192 F. 67 (C.C.D.Minn. 1912), *aff'd*, 204 F. 921 (8th Cir. 1913).

- These cases, and a number of others like them,⁵

⁵ E.g., *Del Madera Properties v. Rhodes & Gardner, Inc.*, 820 F.2d 973 (9th Cir. 1987); *Sawyer v. Crowell Publishing Co.*, 142 F.2d 497 (2d Cir. 1944); *United States v. Hamilton*, 583 F.2d 448 (9th Cir. 1978); *C.S. Hammond & Co. v. International College Globe, Inc.*, 210 F.Supp. 206

illustrate that the maps created by Petitioner herein surpass, by orders of magnitude, the threshold of originality necessary to sustain copyright protection.

In its decision below, however, the Fifth Circuit seemed to acknowledge that the Petitioner's maps displayed the requisite originality.⁶ However, the Court of Appeals cited the "merger" doctrine of *Baker v. Selden*, 101 U.S. 99 (1879), as a basis for finding an unprecedented limitation on copyright protection of maps where the particular cartographic expression represents "the only effective way to convey the idea of the ... location" illustrated in the map. 899 F.2d at 1464.

Petitioner is correct in stating that the Fifth Circuit is the first court to deny copyright protection to a map on the basis of the so-called "merger" doctrine where the map contains an original contribution based on direct observation. See Petitioner's Brief at 15-16. As discussed below, the implications of this holding for Amicus, and for all cartographers, are devastating.

(S.D.N.Y. 1962); *Crocker v. General Drafting Co.*, 50 F.Supp. 634 (S.D.N.Y. 1943); *Newton v. Voris*, 364 F.Supp. 562 (D.Ore. 1973).

⁶ The court stated, "The problem for the copyrightability of the resulting maps...is not a lack of originality, but rather that the maps created express in the only effective way the idea of the location of the pipeline." 899 F.2d at 1464.

II. THE PRINCIPLE ANNOUNCED BY THE FIFTH CIRCUIT POSES AN IMMEDIATE THREAT TO ALL MAPMAKERS BY NEGATING PROTECTION FOR MAPS GENERALLY.

The Court of Appeals below found that the lines drawn on the Petitioner's maps "are certainly the only effective way to convey the idea of the proposed location of a pipeline across 1,000 miles of terrain." 899 F.2d at 1464. The Court of Appeals held that Petitioner's maps were precluded from copyright protection because they "express in the only effective manner the idea of the pipeline's location." 899 F.2d at 1464.

By implication, the original cartographic work of *any* mapmaker is also precluded from copyright protection if the lines drawn by the mapmaker represent the "only effective manner" in which the location of a particular subject can be expressed. This is an astonishing proposition, completely lacking in precedent, which ignores the basic concept known to all cartographers that lines on a map characteristically *are* the "only effective manner" in which the concept of location can be expressed. As stated by the leading scholar on copyright protection in fact works:

If ever there were a literary or art form in which fancy is generally to be discouraged, and in which expression is dictated by fact, it is the map.

Gorman, *Fact or Fancy? The Implications for Copyright*, 29 J. Copyright Soc'y USA 560, 564 (1982).

The chilling effect of the Court of Appeals' opinion in this case cannot be overstated. Mapmakers such as Amicus rely on the copyright law to protect their investment of time,

effort, expense and creativity. As Justice Story recognized in 1839, the very purpose of the copyright law is to protect such "time and skill and attention." *Gray v. Russell*, 10 F. Cas. 1035, 1037-38 (No. 5728) (C.C.D.Mass. 1839). On behalf of itself and all cartographers, Amicus urges the Court to grant Kern River's Petition for Certiorari and correct this serious error of law.

III. THE ISSUE RAISED BY THIS CASE WARRANTS A WRIT OF CERTIORARI.

The issue raised in this case meets or surpasses the degree of importance necessary to sustain a writ of certiorari. As discussed above, the Fifth Circuit's opinion contradicts the basic law of copyright for maps expressed by Justice Story in *Gray v. Russell*, 10 F. Cas. 1035 (No. 5728) (C.C.D.Mass. 1839), and *Emerson v. Davies*, 8 Fed. Cas. 615 (No. 4436) (C.C.D. Mass. 1845). This fact alone should suffice to warrant a writ of certiorari. Cf. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975) (certiorari granted in copyright case to determine whether decision below conflicted with previous Supreme Court holdings).

Moreover, this Court has granted writs of certiorari in copyright cases to resolve conflicts of law among the Circuits which were no more far-reaching than that created by the Fifth Circuit's departure from established precedent in the present case. Compare, *Stewart v. Abend*, ___ U.S. ___, ___, 109 L. Ed.2d 184, 201 (1990); *Community for Creative Non-Violence v. Reid*, ___ U.S. ___, ___ & n. 2, 104 L.Ed.2d 811, 822 & n. 2 (1989); *Dowling v. United States*, 473 U.S. 207, 213 n. 6 (1985); *Mazer v. Stein*, 347 U.S. 201, 203 & n. 3 (1954); *F.L. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 229 & n. 3 (1952).

Even in the absence of a specific conflict among the Circuits, this Court has granted petitions for certiorari in copyright cases to resolve "important question[s] of copyright law." *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 163 (1985); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 7 (1979); *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 400 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 393 (1968); *DeSylva v. Ballentine*, 351 U.S. 570, 572 (1956); *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 647 (1943); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 396-97 (1940).

For the reasons stated above, Amicus submits that the present case raises an issue of unprecedented importance to the mapmaking industry which should be addressed by this Court.

CONCLUSION

For all the reasons discussed herein, Amicus urges the Court to grant Kern River's Petition for Certiorari herein and to reverse the decision of the Court of Appeals below.

Respectfully submitted,
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October 15, 1990

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 15, 1990, copies of the foregoing MOTION OF WIDE WORLD OF MAPS, INC. TO APPEAR AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI were sent by first class mail, postage prepaid, to the following counsel of record:

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October 15, 1990

MOTION 77-1
OCT 15 1990

47
No. 90-443

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

KERN RIVER GAS TRANSMISSION COMPANY,
Petitioner,

v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN
PIPELINE COMPANY, and
WYOMING-CALIFORNIA PIPELINE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE ON BEHALF OF THE
AMERICAN AUTOMOBILE ASSOCIATION, INC.
IN SUPPORT OF PETITIONER

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 90-443

KERN RIVER GAS TRANSMISSION COMPANY
Petitioner,
v.

THE COASTAL CORPORATION,
COLORADO INTERSTATE CORPORATION,
COLORADO INTERSTATE GAS COMPANY,
COASTAL WESTERN PIPELINE COMPANY,
COLORADO INTERSTATE GAS WESTERN PIPELINE COMPANY,
and WYOMING-CALIFORNIA PIPELINE COMPANY
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Automobile Club of America ("AAA"), a Connecticut corporation with a direct interest in the outcome of the captioned case, respectfully moves this Court for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to AAA's filing of this brief. The consent of respondent, The Coastal Corporation, et al., was requested but refused.

STATEMENT OF INTEREST

The American Automobile Association, Inc. (hereinafter "Amicus") is a corporation of Connecticut having its headquarters in Heathrow, Florida. It comprises over fifty clubs and divisions located throughout the United States and provides auto and travel-related services to its 31 million members while working to promote safe and enjoyable travel for all motorists and the travelling public.

To assist its members with their travel plans, Amicus produces and distributes 315 million AAA sheet maps, strip maps and the AAA Road Atlas. Amicus employs a large staff in its cartography department and invests substantial resources in producing and updating its maps. The copyright protection which has been afforded these maps over the past sixty years is highly valued by Amicus.

REASONS FOR GRANTING THE MOTION

As grounds for this Motion, Amicus would show the Court that AAA produces and distributes 315 million maps to its membership (which currently exceeds 31 million members). Amicus is concerned that the decision of the Fifth Circuit will jeopardize the copyright protection in its maps.

As further grounds for this Motion, Amicus would show the Court that the document it wishes to file is very brief and therefore will not represent an undue burden on the limited resources of this Court.

CONCLUSION

WHEREFORE, Amicus moves the Court for leave to appear in support of the Petition for Certiorari herein and to file the brief attached hereto.

Respectfully submitted,
AUTOMOBILE CLUB OF AMERICA

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMERICAN AUTOMOBILE ASSOCIATION, INC. AS AMICUS CURIAE	1
ARGUMENT	2
THIS CASE RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE COMMERCIAL MAPMAKING INDUSTRY.	2
CONCLUSION	4
CERTIFICATE OF SERVICE	5



TABLE OF AUTHORITIES

CASES	Page
<i>Crocker v. General Drafting Co.</i> , 50 F.Supp. 634 (S.D.N.Y. 1943)	2
<i>General Drafting Co. v. Andrews</i> , 37 F.2d 54 (2d Cir. 1930)	2

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and WYOMING-CALIFORNIA PIPELINE COMPANY
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE
AMERICAN AUTOMOBILE ASSOCIATION, INC.
IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Automobile Association, Inc. (hereinafter "Amicus") is a corporation of Connecticut having its headquarters in Heathrow, Florida. It comprises over fifty clubs and divisions located throughout the United States and provides auto and travel-related services to its 31 million members while working to promote safe and enjoyable travel for all motorists and the travelling public.

To assist its members with their travel plans, Amicus produces and distributes 315 million AAA sheet maps, strip maps and the AAA Road Atlas. Amicus employs a large staff in its cartography department and invests substantial resources in producing and updating its maps. The copyright protection which has been afforded these maps over the past sixty years is highly valued by Amicus.

ARGUMENT

I. THIS CASE RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO THE COMMERCIAL MAPMAKING INDUSTRY.

The opinion of the Fifth Circuit Court of Appeals in this case negates the basic copyright protection historically recognized for maps. Petitioner's maps in the present case are fundamentally no different from automobile road maps, such as those published by Amicus, which have historically been held copyrightable. *See, e.g., General Drafting Co. v. Andrews*, 37 F.2d 54 (2d Cir. 1930) (automobile road maps held subject to copyright protection).

For example, in *Crocker v. General Drafting Co.*, 50 F.Supp. 634 (S.D.N.Y. 1943), the court held that an automobile road map prepared for use in advertising a popular resort was, together with its annual revisions and changes, copyrightable, the issue being whether the selection and arrangement of the material on the map itself, together with the manner of presentation or portrayal of the component parts in the map as a whole, was copyrightable. The plaintiff in *Crocker* obtained data on the maps by visits to state capitals, sent detailed maps and cuttings to county superintendents and

engineers, and to local highway departments, for corrections, changes and omissions, and made personal investigations through travelling investigators and field representatives. The plaintiff's data was carefully checked and analyzed before it was used in the maps. The efforts of Petitioner's cartographers in the present case were no less worthy of protection than those of the cartographer in *Crocker* and should be similarly held subject to protection.

Copyright protection for all maps is negated by the Court of Appeals' erroneous application of the "merger" doctrine in this case. Accordingly, Amicus agrees with and hereby adopts the points and authorities put forward by Petitioner Kern River Gas Transmission Co. ("Kern River").

Amicus fully expects that, unless the Fifth Circuit's opinion is reversed, efforts to protect cartographic works as fact works will now be met consistently with the defense that depictions of geographic features on maps, as depictions of fact, are "merged" with the idea of those features and are unprotectable. Protection for maps would therefore be reduced to protecting mere embellishments, such as colors, distinctive symbols and arrangements of material. Depictions of roads, towns, rivers and the like would not be covered, so that original maps of geographic features developed by one party could be freely copied by competitors. Such would amount to a substantial reduction of the protection afforded to maps under existing law.

CONCLUSION

WHEREFORE, Amicus urges the Court to grant Kern River's Petition for Certiorari herein and to reverse the decision of the Court of Appeals below.

Respectfully submitted,
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